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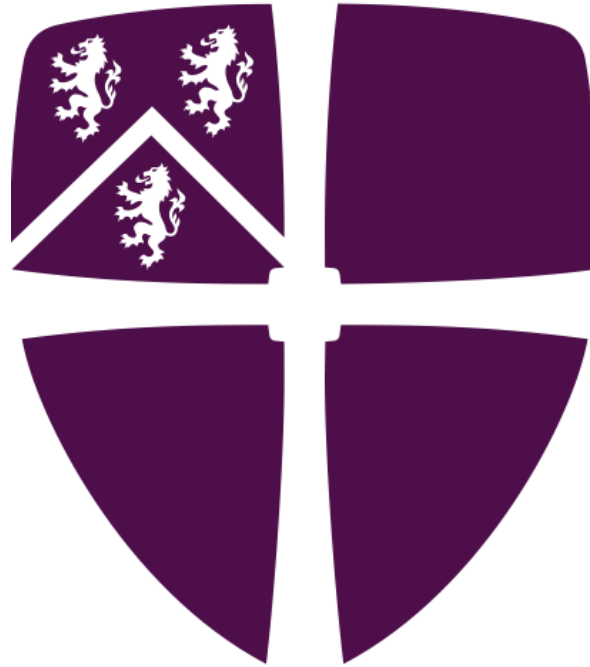
# ***A Thomistic Reading of Small-Scale Uses of Force***

**Christian Nikolaus Braun**

## **Abstract**

This thesis makes both a substantive and methodological contribution to knowledge. Firstly, it assesses the moral issue of a worrisome increase in the use of small-scale force post-9/11 from a Thomistic just war perspective. Concentrating on one such use of force, namely the practice of targeted killing, it engages in a “renegotiation” of the inherited Thomistic *jus ad bellum* in order to address the moral questions raised by this recent development in military conduct. Secondly, the thesis seeks to recover the method of traditional casuistry built around the ethics of Aquinas. Employing “Thomistic casuistry” can, it will be argued, approximate the analytical rigour of the revisionist just war while it does not have to disregard the use of history for moral reflection. In addition, “Thomistic casuistry,” as a distinct “third-way” approach to just war, is capable of triggering an exchange between Walzerians and revisionists, the two dominating contemporary approaches which have faced each other in a “war of ethics within the ethics of war.”

# ***A Thomistic Reading of Small-Scale Uses of Force***



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**Thesis submitted for the degree of Doctor of Philosophy**

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**1 August 2018**

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## **Declaration**

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**Durham, 1 August 2018**

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Ph 1.3

I would also like to thank Simone. *In short, there are three things that last: faith, hope, and love; and the greatest of these is love. 1 Co 13.13*

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# **1 Introduction**

## **1.1 Small-Scale Force post-9/11 – Political Context and**

### **Moral Questions**

The attacks of September 11, 2001 and the ensuing US response have proved to be a challenge for just war thinking. While terrorism as a threat was no new phenomenon, the Bush administration's declaration of a "Global War on Terror" questioned core ideas of contemporary just war. Multiple perspectives were put forward, reaching from supporting a "just war against terror" (Elshtain 2003), to dismissing a general war against terrorism but supporting a war against Al Qaeda (Bellamy 2005), to rejecting the notion of war entirely and defending the law enforcement paradigm (Murphy 2014).

While the academy argued about the appropriateness of a "war" against terrorism, however, the Bush administration exhibited no such indecisiveness. Besides two "classical" wars against the governments of Afghanistan and Iraq the US started a third "war" against individual terrorists. Oftentimes, this latter "war" used small-scale military force only, arguably making such operations look more like policing than actual war fighting. In consequence, although terrorism had traditionally been considered a matter of law enforcement, the new threat of Islamist terrorism made just war theorists reassess that assumption. For most thinkers, the blurring of the lines between peace and war, between the law enforcement and war paradigms, was morally troubling as, it seemed to them, the struggle with terrorism "cannot be well governed within either" (McMahan 2012a, 155).

Arguably, the increase in the use of small-scale force as represented, most prominently, in the policy of targeted killing has been one of the most controversial facets of the "war on terror". Debate about the morality of this practice (see, e.g., Finkelstein, Ohlin, and Altman 2012) has been fierce and, up until the present day,

seems far from being settled. In addition, debate has almost exclusively taken place before the horizon of a narrow intradisciplinary divide in contemporary just war thinking between Michael Walzer's (2015) approach and his revisionist critics (see, e.g., McMahan 2009) about methodological questions. Oftentimes, this introspection has inhibited debate about substantive issues and a convincing attempt to trigger an exchange between the two camps remains wanting. Among the morally troubling substantive issues caused by targeted killings two particular issues stand out, namely those of authority and liability.

### ***The Question of Authority***

With regard to authority, debate about targeted killings has not sufficiently engaged with the issues of the geographical scope of targeted killings, the employment of potentially morally problematic means, as well as the convergence of intelligence and military agencies. To begin with, the geographical borders of the "global war on terror" have been subject to substantial legal debate. Although, this interpretation is highly controversial within international law (see, e.g., O'Connell 2010; Sanders 2014; Schaller 2015), all post-9/11 US administrations have argued that lethal force can be used against terrorists all over the world and they have denied to be bound to formally established warzones. Former Attorney General Holder (2012) summarised their interpretation as follows: "Our legal authority is not limited to the battlefields in Afghanistan. Indeed, neither Congress nor our federal courts has limited the geographic scope of our ability to use force to the current conflict in Afghanistan. We are at war with a stateless enemy, prone to shifting operations from country to country."

Such an expansive interpretation amounts to a challenge of conventional accounts of political space. Until recently, most arguments originated from an understanding of space similar to the Walzerian "legalist paradigm" which cherishes the Westphalian principles of political sovereignty and territorial integrity. Among

just war theorists, Williams (2008, 2015) has been a rather lonely voice in advocating a broader conceptual discussion about space, questioning the school's tradition of state-centrism. However, the legalist paradigm's insignia of statehood have been exploited by terrorist organisations. Judged from one viewpoint, Al Qaeda has been operating under a "regime of non-state responsibility" (Heinze 2011, 1080) in which a state is unable or unwilling to prosecute terrorists operating within its territory. To address this phenomenon, states, according to Heinze (2011, 1082), have expanded the right to self-defence against non-state actors within another state and, in tandem, have applied fewer "normative and legal constraints on using force against states for their tolerance of such activity." As Sanders (2014, 526) laments: "American officials have not only claimed to operate under the war paradigm but have also asserted that the war has no boundaries. This risks legitimating the use of lethal force anywhere in the world." Treating Sanders's fear as having already materialised, Gregory (2011, 239) speaks of an "everywhere war," arguing that "as cartographic reason falters and military violence is loosed from its frames, the conventional ties between war and geography have come undone."

Related to the question of geographical scope has been a technological development, namely the emergence of drone warfare. In particular, two technological aspects are relevant to the notion of an "everywhere war:" The drone's capability to strike precisely and on a small-scale, and its capability to loiter. Due to the small-scale force drones employ, there is, arguably, a reduced risk of escalation toward major ground war (Brunstetter and Braun 2013, 99). With drones, the US has been able to kill terrorists in sovereign countries without the prospect of having to go to war with that country. As a result, the US can now follow terrorists to places previously out of reach. Having this new kind of access, the concept of the battlefield has arguably been redefined. The traditional understanding of the battlefield "defined by the locatable space of an effective combat zone" was replaced "by the simple

presence of the hunted individual who carries with him everywhere a kind of little halo denoting a personal hostility zone” (Chamayou 2011, 3).

Making this hunt for individuals possible was the drone’s second technological aspect. Its loitering capacity has enabled the US to carry out surveillance over large areas and over extended periods of time, waiting for an opportunity to arise to kill a person it determines to be targetable. This marked a major technological leap as the US can now follow and combat terrorist activity in real-time. In the military’s jargon, the drone is the only weapon system that can find, fix, and finish simultaneously (Woods 2015, 3). As a result, the introduction of the drone equalised, or even turned upside down, the advantage terrorists had enjoyed over the state. As Kahn (2013, 220-223) argues, “The terrorist seeks a vivid asymmetry by asserting a capacity to threaten anyone, at any place, and at any time. (...) The tactical asymmetry achieved by the terrorist has been met by the high-tech war of the West. (...) Replacing the human with the technological, we too have claimed the capacity to target anyone, anywhere, and at any time.” Following up on the assumption that the drone has given the state the edge over the terrorist, the question arises, again, but now in a new context, whether “war” is still the correct frame for this kind of warfare. As Kahn (2013, 221) notes:

*Jus in bello* requires a *bellum*. Without that, we have moved from the ethos of warfare to that of law enforcement. (...) The ethos of policing is perfected when it achieves asymmetry. The criminal has no right to use force against those seeking to enforce the law. He cannot legally defend himself against the police. Similarly, policing is risky, but it is not a practice of sacrifice. If the risk is too great, a police officer can withdraw. He can even resign. He acts, moreover, under a strict rule of discrimination; we do not speak of acceptable collateral damage with respect to policing. Law enforcement targets the wrongdoer and him alone.

Last but not least, the policy of targeted killing - through drone strikes, conventional airstrikes, and commando raids - has been carried out by two actors, the CIA and the military. The two institutions’ increasing “convergence” (Chesney 2012) is emblematic of the evolution of the “war on terror” and has raised questions about

the “right” authority to carry out such strikes. Not only does this convergence enable “shadow wars” in the first place, it also provides an account of a surprising continuity between the Bush and Obama presidencies. The embrace of paramilitary operations by the CIA is directly related to the attacks of 9/11. Before 9/11, the CIA, and the United States government in general, had been opposed to targeted killings (Mayer 2009). The use of the CIA for tasks normally carried out by the military was attractive to the Bush administration as a way of surpassing the traditional military chain of command. As the CIA answers directly to the president, the agency can act more quickly than the Pentagon. As a result, the CIA director became sort of a military commander running a war with little oversight (Mazzetti 2013, 13). Soon after, while the CIA had the initial lead role in the “war on terror” and has remained a powerful player ever since, the Bush administration started to build up the military’s Special Forces as a capability that “could provide far greater flexibility” (Scahill 2013, 58). For example, the Pentagon can conduct covert operations without host government approval and virtually no congressional oversight. As a result of the embrace of irregular warfare within traditional wars, the US started to wage two wars at the same time – a conventional and an irregular one (2013, 142). However, such “shadow wars” (Kibbe 2004, 2012) blur the line between spying operations and traditional military conduct and both departments have increasingly become alike (Horton 2015, 120). Given this development, it is timely to investigate which institution should be granted the authority to carry out targeted killings.

### ***The Question of Liability***

In their response to the attacks of 9/11 consecutive US administrations have considered themselves to be in an ongoing non-international armed conflict and have rejected the traditional distinction between civilians and combatants as agreed to in the Geneva Conventions. The US distinguishes between civilians, lawful combatants, and a newly invented class of “unlawful enemy combatants” (under Obama re-labelled



as “unprivileged enemy belligerents”). Individuals judged to belong to the latter category are denied the Geneva protections and are considered to be targetable based on group membership. That take has been contested as the internationally accepted interpretation determines targetability based on active participation in hostilities (see, e.g., UNHCR 2010).

Adding to the question of who is liable to targeted killing, the Obama administration employed a controversial understanding of pre-emption which is commonly considered to be a part of self-defence. In contrast to the traditional understanding which relies on the qualifier of imminence the administration sought to redefine imminence as a permanent state in the face of the absence of evidence that a potential assailant has no intention to carry out an attack now or at any point in the future (see, e.g., Erakat 2014; Trenta 2018). Arguably, the Obama administration’s new conceptualisation of imminence sits uneasily between defensive, preventive, and retributive uses of force and raises important questions regarding just cause and right intention.

As far as the morality of war is concerned, the debate about the legality of targeting individual terrorists resonates within contemporary just war debate. Walzerians are arguably close to the argument put forward by recent US administrations. While Walzer does not embrace the new interpretation of imminence, he (2016) proposes a distinction between insurgent groups like the IRA and terrorist networks. While it might make sense to uphold international law’s ban on targeting political leaders in the case of insurgent groups, Walzer denies this distinction to terrorist leaders. As he (2011) put it in the case of the killing of Osama bin Laden: “So the killing of Osama bin Laden was an act of war. He was certainly a legitimate target, as the head of an organization that had declared itself to be at war with the United States - and delivered a devastating attack.” Emery and Brunstetter

(2016) are even closer to the Obama administration, arguing for a limited preventive employment of targeted killing.

Revisionists, in contrast, due to their individualist morality, cannot accept a targeting process which considers group membership as sufficient to employ lethal force. In contrast, they (see, e.g., McMahan 2005a, 2009) argue for a moral liability account; in order to become targetable, an individual must have forfeited her right not to be harmed. Importantly, the revisionist account of moral liability is tied to the sole just cause of self-defence. McMahan (2009, 8), in particular, objects to a moral culpability account which can also allow for retributive uses of force. In sum, moral debate about liability to targeted killing is far from being settled and has also taken place before the horizon of the “war of ethics within the ethics of war” (Vaha 2013, 183) between the two dominant approaches to contemporary just war thinking.

## **1.2 Opportunity for a Distinctive and Original Contribution**

This thesis seeks to make a distinctive and original contribution to the debate about the morality of targeted killings as well as assess the methodological divide in contemporary just war thinking between Walzerians and revisionists from a “third-way” perspective. Arguing from a Thomistic understanding of just war, it seeks to regulate the practice of targeted killing of culpable unjust individuals and thereby address the concerns about authority and liability raised by that practice.

While there seems to have been a renewed interest in the classical Christian just war generally (see, e.g., Biggar 2013a; Elshtain 2003; O’Donovan 2003) and in the thought of St Thomas specifically (see, e.g., Cole 1999; Gorman 2010a, b; Johnson 2014; Murphy 2012; Reichberg 2017) the question of the morality of targeted killings has so far evaded the Thomistic just war. In addition, responding to the second major

shortcoming, this thesis makes a methodological contribution to just war thinking by recapturing the traditional method of casuistry. Such a historical reading of the policy of targeted killing is wanting and can provide a distinctive perspective on the ongoing “war of ethics” between Walzerians and revisionists.

### ***Contributing to the Concern about Authority***

The Thomistic just war can provide unique insights about the authority to conduct targeted killings and also advance debate toward a better understanding of the contemporary disagreement about authority between Walzerians and revisionists. Importantly, St Thomas listed the authority criterion in first place. This prominent role for authority relates to the classical idea that only sovereign authorities with the responsibility for the common good of the political community could wage war or *bellum*. Uses of force by individuals, while justifiable in self-defence, could not rise to the level of *bellum* (Johnson 2014, 31).

Interestingly, the distinction between public and private uses of force is of continuing relevance today. Walzerians, for example, are not too distant from the classical perspective. They insist that, in order to be justified, war must be waged by a legitimate authority. For Walzerians, as for international law, that authority is commonly the nation-state, although resistance movements, when representing the political community, can also meet the authority test. Non-state actors like terrorist groups, however, which do not have the support of the community, necessarily fail the authority test. Given Walzerians’ emphasis on the political community, there are curious parallels with the classical conceptualisation (O’Driscoll 2009, 33). However, Walzerians do not argue for the classical, pre-Westphalian understanding of the sovereign as instituted by God. Rather, they embrace the Westphalian conceptualisation of the ruler as representative of the political community who has been authorised by that community. In particular, Walzerians uphold the Westphalian standard of a state’s right to political sovereignty and territorial integrity.

In contrast to both the classical and Walzerian just war most revisionists seek to de-emphasise the importance of the authority criterion. Some (see, e.g., Steinhoff 2007) even argue for abandoning the criterion entirely. In a nutshell, revisionists argue that individuals can wage war, too; the authority criterion should not be a pre-requisite for waging war. Underlying this disagreement are different units of analysis. Classical and Walzerian just war thinkers start with the political community. Revisionists, however, start with the individual.

Reassessing the contemporary disagreement between Walzerian collectivists and revisionist individualists from a classical just war perspective can provide a distinctive, though no neutral, discussion about authority. While Walzerians distinguish between two different moralities of war and peace and have suggested a distinct third morality of *jus ad vim* (see chapter 2), revisionists are insistent that there is only one morality, namely that of individual morality. In this respect, St Thomas's thinking was arguably closer to Walzerians. As Reichberg (2013, 182) points out, Aquinas distinguished between two moralities in the sense that only "public war" could constitute a just war whereas private uses of force he considered as "war" only in a limited sense. At the same time, however, Aquinas can be read as being supportive of Frowe's critique that *jus ad vim* as a distinct moral framework besides *jus ad bellum* is redundant; for Aquinas, small-scale uses of force as used in targeted killings are acts of war, *bellum*, when carried out by a sovereign authority.

Moreover, the Thomistic just war can illuminate debate about the symmetry question. For Aquinas, there is no moral problem when a sovereign authority justifiably targets a culpable unjust individual without that individual having a chance to fight back. In other words, "killing by remote control" (Strawser 2013) should raise no moral concern if the use of force is justified. Debate about the so-called "convergence issue" can also be advanced by a Thomistic interpretation as what matters foremost for Aquinas is that the use of force by representatives of the

sovereign authority is just. Who exactly carries out the action is of secondary importance only as long as the mission's justness is not concerned.

Furthermore, the Thomistic just war can make a contribution with regard to targeted killings vis-a-vis the Westphalian principles of political sovereignty and territorial integrity. The classical understanding of sovereignty held that in cases of grave violations of the natural law a state's territorial borders should not be allowed to function as insurmountable barrier against the establishment of justice. Thus, when seeking to regulate the practice of targeted killing there needs to be an answer to the question of when small-scale uses of force against culpable unjust individuals on a foreign state's territory, if at all, can be justified. More generally, looking at current debate, there have been very few arguments for a classical understanding of sovereignty and those which have been made (see, e.g., Coates 2016) do not withstand all attacks by revisionist thinkers (see, e.g., Steinhoff 2007). There is thus an opening for a nuanced classical perspective on the authority criterion which this thesis seeks to provide.

### ***Contributing to the Concern about Liability***

The Thomistic just war can also make a distinctive and original contribution with regard to the question of who becomes liable to targeted killing. Importantly, the dominant interpretation of the Thomistic just war embraces a moral culpability account in order to determine who is liable to lethal force. However, the account of moral culpability, as noted above, is rejected by revisionists who advocate an account based on moral liability to defensive force. In particular, revisionists object to the just cause of retribution which is inherent to moral culpability. Interestingly, in the limitation of force to self-defence, the revisionist argument overlaps with Walzer's legalist paradigm granted one accepts the possibility that the UN Security Council may authorise retributive uses of force. At the same time, both the classical and the revisionist just war agree that the Walzerian justification for killing in war based on

group membership alone can be morally problematic. Arguing that contemporary just war debate deliberately dismisses important moral concerns this thesis reflects on the contemporary limitation of war to self-defence as well as the differences between accounts of moral culpability and moral liability. It concludes that adopting a Thomistic culpability account which allows for strictly limited uses of retributive targeted killing would constitute a moral advancement.

Furthermore, by making a clear-cut distinction between self-defence and retribution the Thomistic reading of targeted killing is able to avoid a “broadened conception of defense” (Kaplan 2015) employed by Brunstetter. As Kaplan notes, Brunstetter and Braun (2013, 96) list as just causes for *jus ad vim*, to which the practice of targeted killing would belong, “responding to terrorist bombings, attacks on embassies or military installations, and the kidnapping of citizens.” Employing force in such circumstances, however, arguably falls under the realm of retribution rather than self-defence as the use of force responds to a past wrongdoing. Moreover, in the piece written together with Emery (2016), Brunstetter includes preventive uses of force within the just cause of self-defence. This thesis argues that clearly distinguishing between self-defence and retribution as well as denying the use of preventive force constitutes a moral benefit which does not require the introduction of such uses of force through the backdoor.

Importantly, however, while there is a general just cause of retribution, the criterion of right intention must also be met in order for targeted killings to be just. Arguably, the criterion of right intention has not received sufficient attention in contemporary debate. It seems that it is especially hard to grasp for revisionists who seem to have little place for this internal criterion which uneasily fits their rigorous analytical scrutiny. Having said that, Aquinas has a prominent place for right intention. More specifically, right intention, for the Thomistic just war, unfolds within an account of virtue ethics. It seems that currently a re-appropriation of virtue ethics

is taking place. Besides MacIntyre's seminal work (2013), there has also been a modest revival of the Thomistic just war with regard to the virtues. Besides contributors such as Cole (1999) and Gorman (2010a, b), Reichberg (2017) has most recently provided an innovative interpretation of Thomistic right intention based on the virtues of military prudence and battlefield courage. However, the practice of targeted killing has not yet been considered from a virtue ethics perspective. This thesis seeks to remedy this shortcoming by taking into consideration recent developments in papal thinking on matters such as the death penalty.

### ***Contributing to the Methodological Debate***

Last but not least, through Thomistic casuistry, this thesis makes a distinctive contribution to the debate about the morality of targeted killing specifically and the ethics of war generally. While Walzerians employ an untraditional type of casuistry, revisionists belong to the school of analytical philosophy and mostly rely on the method of "reflective equilibrium." In contrast to Walzerian casuists, this thesis, in its chapter on liability to targeted killing, employs a traditional casuistical analysis which does not start from legal but moral principles taken from Thomistic ethics. Reflecting on cases of small-scale uses of force carried out by the Obama administration the casuistical investigation "renegotiates" (O'Driscoll 2008a) the inherited Thomistic just war principles of just cause and right intention with regard to novel circumstances. Traditional casuistry provides a distinctive set of tools which can be employed to demonstrate that the ethics of war is richer than the contemporary narrow intradisciplinary split suggests. In addition, one particular merit of the casuistical method is that it shows that some of the substantive disagreements between Walzerians and revisionists do not arise from their different methods. Consequently, while it cannot resolve the disagreement about the best method, the Thomistic just war can provide a platform for an exchange about substantive issues such as, for example, the moral equality of combatants.

### 1.3 The Investigation

As noted above, the significant increase in the use of small-scale force post-9/11 has posed serious moral questions which just war thinkers have sought to answer. One such attempt, Walzer's suggestion of a distinct moral framework of *jus ad vim*, will be discussed in the second chapter. *Jus ad vim*, the chapter notes, has been, like the Walzerian just war generally, subject to a revisionist critique. The revisionist critique of *jus ad vim* holds that it is redundant as a distinct third morality besides those of war and peace simply because there is only one morality, namely that of individual morality. Debate about *jus ad vim* thus lays bare the tension between Walzerian and revisionist approaches to just war and functions as the ideal entry point for the thesis's substantial methodology chapter that follows. This is particularly so because the Thomistic just war, although it employs a very different methodology, essentially vindicates the revisionist argument that *jus ad vim*, as a distinct moral framework, is redundant.

As the Thomistic just war is in a unique position to provide a nuanced perspective on the methodological disagreement between Walzerians and revisionists the methodology chapter provides an in-depth analysis of the respective approaches. Moreover, this chapter is the key to understanding the two stage argument the thesis makes with regard to the policy of targeted killing. The chapter points out the differences between Walzerians' legalist interpretation of casuistry and revisionists' method of reflective equilibrium. Their main difference is that Walzerians rely on historical cases while most revisionists prefer to construct artificial thought experiments.

At the same time, however, both Walzerians and revisionists downplay the just war tradition as they do not elaborate on the ideas of previous thinkers. By doing this, the competing camps differ markedly from the "historical approach" (O'Driscoll 2013, 47) to just war. That approach will be introduced through an overview about the



historical method of James Turner Johnson, the most influential contemporary historical just war thinker. Presenting the historical approach as a “third-way” in-between Walzerians and revisionists the chapter demonstrates via the example of the moral symmetry thesis that the historical approach can be employed in order to refocus debate on substantive questions. Having done this, the status of Johnson’s just war as most influential contemporary historical approach notwithstanding, it will be argued that the historical approach can take more than one path and Johnson’s particular approach to Aquinas, due to its relative neglect of Thomistic virtue ethics, does not constitute the best path to determine liability to targeted killing.

Consequently, the chapter notes that the argument of this thesis unfolds in two stages. Firstly, in the chapter on sovereign authority, based on conventional textual assessment, questions concerning the authority to execute targeted killings will be investigated. Importantly, the argument the authority chapter makes rests on Johnson’s (see, e.g., 2014) succinct history of the development of the idea of sovereignty. Secondly, due to the crucial role of the virtues with regard to the Thomistic interpretation of just cause and right intention, the liability chapter relies on a historical approach different from Johnson’s. Therefore, the methodology chapter introduces Thomistic casuistry, built around Aquinas’s virtue ethics, as the distinct and original methodological contribution this thesis makes. Moreover, the chapter seeks to address critics of the casuistical method, arguing that the recapture of traditional casuistry can avoid the trap which historically led to the poor reputation of casuistry as an intellectual exercise capable of justifying almost any, just or unjust, action.

The chapter on sovereign authority provides a conventional textual analysis and subsequent argument about the relative congruence, consistency, and logic of St Thomas’s natural law position over that of both Walzerians and revisionists. It seeks to answer the question of who has the authority to carry out targeted killings and how

far that authority extends. The chapter concludes that a partial recovery of the Thomistic understanding of sovereignty, both internally and externally and in contradistinction to the Westphalian understanding, is the most ethical way of regulating small-scale force.

Next is the cases chapter which portrays instances of small-scale employments of force by the Obama administration. These cases function as the basis for the Thomistic casuistical analysis of the question of who is liable to targeted killing. Within the casuistical analysis, the Thomistic just war is contrasted with contemporary just war thinking. More specifically, the chapter re-assesses today's rejection of retributive uses of force, upheld by both Walzerians and revisionists, as well as revisionists' strict advocacy of a moral liability account. After establishing that the policy of targeted killing can have the just causes of self-defence and retribution the analysis turns to the criterion of right intention, considering both potential just causes from a Thomistic virtue ethics perspective. The chapter concludes that, beyond the uncontroversial just cause of self-defence, retributive targeted killings, although morally justifiable in principle, must meet the very high standard of right intention and are thus highly unlikely to be justifiable in practice.

## **2 *Jus ad Vim* as Attempt to Grapple with Small-Scale Force**

This short chapter evaluates the concept of *jus ad vim* as a new moral framework within just war thinking advocated by Walzerians in order to grapple with the morally worrisome increase of small-scale force post-9/11. It starts off with an overview about the rationale behind *jus ad vim* and, then, assesses the charge of redundancy revisionist just war thinkers have made in opposition to it. The chapter concludes that, from a Thomistic point of view, *jus ad vim*, as a distinct moral framework, is indeed redundant. However, the increase of small-scale force as represented by the practice of targeted killing is a very real moral concern which requires a “renegotiation” (O’Driscoll 2008a) of the inherited *jus ad bellum* principles which this thesis, in its subsequent argument, seeks to provide.

In a new preface to *Just and Unjust Wars*, Michael Walzer (2006a, xv-xvi) introduced a novel moral framework in response to the measures taken against the regime of Saddam Hussein prior to the 2003 war. In what he called *jus ad vim*, Walzer pondered over a theory governing the just use of force short of war. In his treatment of counterterrorism policies, on which the *jus ad vim* debate subsequently concentrated, Walzer (2007, 484) argues that there is a “different ‘feel’” to such operations as they are neither outright acts of war nor of peacetime law enforcement. As a consequence, he (2006b, 12) argues that “we can’t stop with just war theory,” identifying a need to “maneuver between our conception of combat and our conception of police work, between international conflict and domestic crime, between the zones of war and peace.” Walzer thus abandons the strict distinction between two moralities which he continues to uphold for what he sees as a clear dichotomy between war and peace and his “maneuver” between these two moralities gives birth to *jus ad vim* as a distinct third moral framework. A few years later, when

President Bush's third "war" arguably became the preferred way of "war" under President Obama through the 44<sup>th</sup> president's embrace of the policy of targeted killing the concept of *jus ad vim* started to gain traction within just war debate.

Only ten days after the 9/11 attacks, Walzer (2001) distinguished between a "metaphorical war" against terrorism and the "real thing," expecting that the line between law enforcement and war paradigms might become blurred. In order to demonstrate the difficulty to apply either, Walzer (2006b, 10) provides an example which illustrates his idea about *jus ad vim*. Referring to a US missile strike in Yemen in 2001, Walzer hypothetically transfers the strike to Afghanistan, a zone of war where the United States was engaged in armed conflict, and to Philadelphia, a zone of peace within the US itself. Had the attack happened in Afghanistan, Walzer reasons, it would have been justified as "it is part of the awfulness of war that people actively engaged on the other side can legitimately be killed without warning." Had the attack happened in Philadelphia, however, Walzer asserts that the law enforcement paradigm would have had to be applied: "In Philadelphia, the (suspected) terrorists would have to be arrested, arraigned, provided with lawyers, and brought to trial. They could not be killed unless they were convicted – and many Americans, opposed to capital punishment, would say: Not even then." With regard to the Yemen attack, Walzer (2006b, 11) provides the moral rationale behind *jus ad vim* as a hybrid between war and law enforcement paradigms:

Yemen is somewhere between Afghanistan and Philadelphia. It isn't a war zone, but it also isn't a zone of peace – and this description will fit many, not all, of the 'battlefields' of the 'war' against terrorism. In large sections of Yemen, the government's writ doesn't run; there are no police who could make the arrests and no courts (...) The Yemeni desert is a lawless land, and lawlessness provides a refuge for the political criminals called terrorists. The best way to deal with the refuge would be to help the Yemeni government extend its authority over the whole of its territory. But that is a long process, and the urgencies of the 'war' against terrorism may require more immediate action. When that is true, if it is true, it doesn't seem morally wrong to target Al Qaeda militants directly – for capture, if that's possible, but also for death. Yemen in this regard is closer to Afghanistan than to Philadelphia.

Under such circumstances, the concept of *jus ad vim* might function as justification for counterterrorism operations; although legally acts of war, *jus ad vim* actions should not be judged the same way as actual war because the lethal force employed resembles neither quantum nor duration of traditional warfare (Walzer 2006a, xiv). Walzer's preference would be that some sort of international policing action would be attempted first, but in case such efforts fail, unilateral lethal action would be morally justifiable.

Unfortunately, Walzer never elaborated in any greater detail on his idea of *jus ad vim*. This task has been taken on by a new generation of just war thinkers of whom Daniel Brunstetter, either alone (2013, 2015, 2016) or with varying co-authors (Braun and Brunstetter 2013; Brunstetter and Braun 2013; Emery and Brunstetter 2016), has been the most prolific contributor. Brunstetter's *jus ad vim* builds on Walzer's initial idea although he does not consider himself to be a "pure Walzerian" (personal communication, October 17, 2017). Despite Brunstetter's leading role, the account of *jus ad vim* which has most relevance for this thesis is Ford's (2013). Ford (2013, 65) defines *vim* as "an act of intentional killing of a person who is a culpable unjust threat, by a member of a military institution, acting on behalf of a legitimate political community which is not at war." He (2013, 64) speaks of a "hybrid ethical framework" drawing from just war principles and the policing paradigm. As to the question why a new framework is timely, Ford (2013, 66) suggests three reasons: "The first is to require us to make more effective moral judgments about the just and unjust uses of lethal force that are *already* happening outside of the context of war. The second is to ensure that the extraordinary permissions to kill that we allow in war do not become normative outside that context. The third is to apply stricter and better specified rules of engagement for soldiers in situations of conflict short-of-war." The major advantage from a moral point of view, for Ford, is that the new paradigm avoids the full destructiveness of war even though it might involve the use or threatened use of lethal force. It should thus be seen as an attempt to confine the "dogs of war" (2013,

70): “The conventional just war approach suffers from a false dichotomy where the use of lethal force by the military is judged through the lens of either no conflict whatsoever or all-out war. It seems more reasonable to suggest that situations of conflict short-of-war might require a range of moderated responses, *including* military options” (2013, 71).

While Ford’s conceptualisation concentrates on targeted killing, for Walzer, as well as for Brunstetter, the *jus ad vim* project goes beyond that practice. That is why Ford distinguishes between a “broad” and “narrow” account of *jus ad vim* (2013, 64). In contrast to the narrow account, the broad account also allows for actions short of war against states, such as “embargoes (stopping ships on the high seas) and the enforcement of no-fly zones (bombing radar and anti-aircraft installations)” (Walzer 2006a, xiv). In line with the focus on actions undertaken by sovereign states, Brunstetter and Braun (2013, 98) have proposed the new criterion of “probability of escalation” which seeks to avoid a transition of *jus ad vim* acts to full-scale war between states. Since the publication of two initial pieces in *Ethics & International Affairs* (2013) and the *Journal of Military Ethics* (2013), in co-authorship with Megan Braun, Brunstetter has elaborated on the broad conceptualisation which he imagines as a larger research project, most recently suggesting the development of a *jus in vi* and *jus post vim* (2016, 135). It goes without saying that the narrow account has a place within the broader take and, in fact, both Walzer and Brunstetter have argued about the ethics of targeted killing. Walzer (see, e.g., 2016) has done so without explicitly referring to *jus ad vim*, but Brunstetter (Emery and Brunstetter 2016) has embedded his argument for targeted killing in a framework of *jus ad vim*.

## 2.1 *Jus ad Vim* and the Issue of Redundancy

Of the broad and narrow accounts of *jus ad vim* only the former conceptualisation has received critical attention (see, e.g., Coady 2013; Frowe 2016; Enemark 2014; Kaplan 2015; Plaw and Colon 2015; Rudolf 2014). As a result, debate about *jus ad vim* has so far failed to address critical moral issues arising from the practice of targeted killing. Furthermore, debate about *jus ad vim* has become stuck in a “war of ethics ” between Walzerian and revisionist just war thinkers in which both sides disagree about substantive and methodological questions.

Among the criticisms of *jus ad vim*, Frowe’s (2016) is the most important as it applies to both the narrow and broad conceptualisation. Importantly, her rejection of *jus ad vim* follows the just war thinking of the revisionist school (see 3.2). The fact that Brunstetter’s (2016) response to Frowe relies on Walzer’s way of arguing demonstrates that debate about *jus ad vim* takes place before the background of the general split within contemporary just war thinking. Brunstetter begins his rebuttal by situating the conversation about *jus ad vim* within that wider debate. He asserts that Frowe’s understanding about the use of force derives from a worldview that is “fundamentally” (2016, 131) different from his. In particular, he takes issue with the revisionist claim that there is no moral difference between the state of war and the state of peace. Brunstetter further rejects the rights-based liability account which revisionists propose instead (2016, 131). Unsurprisingly, as revisionists only accept one morality, Frowe (2016, 122), in her critique, detected an unnecessary concentration on the question about whether a specific use of force counts as war.

With regard to method, the fundamental differences between the two competing camps are also apparent in the two papers. Brunstetter’s starting point, following Walzer, have been real cases of force short of war (2016, 131). Frowe, in contrast, does not need to consider history in order to make an attempt at proving Brunstetter wrong. Instead, she (2016, 121) resorts to a thought experiment in order

to arrive at a state of reflective equilibrium. As part of her substantive critique, Frowe (2016, 119-120) criticises Brunstetter for considering the *ad bellum* principles as a “one-off judgment” which only needs to be met at the onset of war while, correctly interpreted, must continuously be re-assessed as long as the war lasts. Most importantly, she argues that *jus ad vim* as a distinct moral framework besides *jus ad bellum* is “redundant;” the existing *jus ad bellum* framework can appropriately judge uses of force short of war (2016, 123-126). However, despite Frowe’s partly substantive critique it seems that, overall, the conversation between the two authors has been rather narrow as a consequence of the “confusingly polarized” (Clark 2017, 331) state of contemporary just war.

The Thomistic understanding of just war can make an important contribution to the debate about *jus ad vim* because it sides with neither Walzerians nor revisionists all the time. As this section points out, while the Thomistic just war sides with Walzerians that there is in fact a moral difference between war and peace it, at the same time, must embrace the revisionist view that *jus ad vim* as a distinct third moral framework is redundant. With regard to the question of whether it does make a moral difference whether a use of force is carried out in times of peace or in times of war St Thomas’s thinking was arguably closer to Walzerians than to revisionists. As Reichberg (2013, 182) points out, Aquinas distinguished between two moralities in the sense that only “public war” could constitute a just war whereas private uses of force he considered as “war” only in a limited sense. That is why Aquinas, in his seminal definition of a just war (ST, II-II, q. 40, a. 1), gave a prominent role to the authority criterion which limited the right to wage war to the sovereign who has been entrusted with the responsibility for the common good of the political community. Furthermore, Aquinas distinguished between “general war” (*bellum publicum*) and “particular war” (*bellum particular*). The former mode of war St Thomas

(...) contrasted to a ‘particular war’ (*bellum particular*), which designated force that was used by or directed against private individuals. It could be just or unjust,



depending on the case. Individuals engaged in gang violence (*rixa*), or criminals resisting arrest would be waging an unjustifiable 'private' war; inversely, 'a judge who does not refrain from giving a just judgment despite fear of an impending sword' is cited in the same passage (q. 123, a. 5) as an instance of an individual undergoing a just private war. The same could be said of any private individual who made proportionate use of force in defending himself from the attack of thieves or other malefactors. *Bellum generale*, by contrast, designated the condition whereby one 'multitude' (that is to say, the fighting force of an independent polity) contends against another such multitude on the battlefield, and in the process each considers the other its external enemy. For Aquinas, this was *bellum* in the most proper sense of the term. (Reichberg 2013, 188)

In consequence, the revisionist argument that any individual has the authority to wage war (see 4.2), from a Thomistic perspective, is mistaken.

At the same time, however, Aquinas can be read as being supportive of Frowe's critique that *jus ad vim* as a distinct moral framework besides *jus ad bellum* is redundant; for Aquinas, small-scale uses of force as used in targeted killings are acts of war, *bellum*, when carried out by a sovereign authority. In other words, medieval thinkers like St Thomas did not make the modern distinction between military and police uses of force. If executed on behalf of a sovereign authority any use of force, externally or internally, just or unjust, would be an act of war. Following from this logic, a distinct moral framework of *jus ad vim* is indeed redundant. The Thomistic just war thus vindicates the revisionist critique.

Importantly, while Aquinas would have used the term war for today's police uses of force this does not mean that such a *domestic* war was subject to the same proportionality and discrimination calculations as war between political communities. The reason for this is that domestic violence carried out by individuals usually does not even come close to the magnitude or duration of war between political communities. While there may be instances of domestic war like sedition which may call for a more permissive interpretation of the amount of force that can be employed such cases are exceptional. More common, during the days of St Thomas, was the domestic employment of force through the imposition of the death penalty.

For Aquinas, the death penalty constituted an act of war carried out by a sovereign authority against a culpable wrongdoer. In fact, one particular reading of Aquinas which concentrates on a punitive reading argues that St Thomas imagined the death penalty as the domestic parallel to war between political communities (Murphy 2012, 177). The death penalty, however, if executed after a trial that established the guilt of the wrongdoer was the most discriminate of employments of force as only the wrongdoer was targeted and there was no risk that innocent people would be harmed. In addition, in order for the death penalty to be deserved, the crime committed had to be very grave. Otherwise, a less severe punishment would have been obligatory. It goes without saying that a trial which determines the right punishment takes place without the heat of battle of wars between political communities. Aquinas thus accepted that in the latter type of war the use of force had to be less discriminate. In other words, while both forms of force, domestic and external, constituted acts of war, they would not necessarily be subject to the same rules of conduct. As a result, while from a Thomistic perspective the concept of *jus ad vim* is redundant the question of how small-scale uses of force, which have increased worrisomely since 9/11, should be governed still needs to be answered.

## **Conclusion**

This short chapter has demonstrated that one of the first attempts to regulate the worrisome increase in small-scale force post-9/11, namely Walzer's *jus ad vim*, is redundant not just from a revisionist point of view, but also as seen from a classical just war perspective. For Aquinas, the actions Walzer initially suggested as falling under *jus ad vim* such as the imposition of no fly zones, intercepting ships on the high seas, or the policy of targeted killing clearly would have been acts of war. The reason for this is that those are uses of force carried out by a sovereign authority. However, because such employments of force are small-scale and look very different compared

to a major ground war between states, instead of a new distinct moral framework, a re-assessment of the established *jus ad bellum* principles in light of new circumstances is needed. This thesis, in its substantive chapters on authority and liability seeks to provide this re-assessment for the policy of targeted killing.

### 3 Thomistic Casuistry and the “War of Ethics”<sup>1</sup>

As thinking about the morality of war has evolved over many centuries different approaches have been employed by a diverse group of scholars. Contemporary just war debate has mostly been split into two competing camps. On the one hand, one finds Walzer’s casuistical approach which has arguably been the most influential interpretation of just war in the second half of the twentieth century. On the other, one encounters the revisionist just war which has the explicit goal to reveal the flaws of the Walzerian theory and develop a better one. Walzer, in return, makes no secret about his disdain for the revisionist just war which prefers to rely on artificial thought experiments. Such ahistorical reasoning, Walzer criticises, cannot be reconciled with the way he and his predecessors have worked and that, in addition, has little practical relevance. As a result of their fundamental methodological disagreements, both camps hardly engage with each other’s substantive work and a narrow intra-disciplinary divide has developed, the “war of ethics.”

This chapter takes a closer look at the debate between Walzerians and revisionists and contrasts their methods with the historical approach to just war as suggested by its most prominent contemporary advocate, James Turner Johnson. On the one hand, while Walzerians, like the historical approach, reflect on historical cases engaging with the ideas of previous thinkers is only of marginal interest to them. On the other, most revisionists reject both of these core elements of the historical approach. Having these differences in mind, the following section presents the

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<sup>1</sup> Parts of this chapter have been published in Braun, Christian Nikolaus. 2018. “The Historical Approach and the ‘War of Ethics within the Ethics of War.’” *Journal of International Political Theory* 14 (3): 349-366. Further parts will be published in Braun, Christian Nikolaus, and Jai Galliot. 2019. “*Jus ad Vim* and the Question of How to Do Just War Theory.” In *Force Short of War in Modern Conflict: Jus ad Vim*, edited by Jai Galliot. Edinburgh: Edinburgh University Press.

historical approach, which itself comes in different variations, as a third way of reasoning in-between Walzerians and revisionists capable of providing a distinct perspective. Then, through a discussion of the moral symmetry thesis, the arguably hottest topic in the “war of ethics,” it will be demonstrated that revisionists succeed in their critique which holds, against Walzerians, that the moral symmetry thesis is ethically indefensible. However, the historical approach also establishes that, in order to arrive at this judgement, it is not necessary to resort to analytical construction. Rather, the historical approach makes evident that the root of Walzer’s problematic argument lies in his limited interest in the just war tradition.

The following section, then, introduces the method this thesis employs in the chapter that determines liability to targeted killing. Arguing that Johnson’s interpretation of the historical approach partly misses the transcendental element of Aquinas’s virtue ethics this section introduces a distinct reading of the historical approach which it calls Thomistic casuistry and which seeks to remedy this imperfection of Johnson’s just war. Consequently, this section paves the way for the second stage of this thesis’s moral argument with regard to targeted killing. While the first stage of this thesis’s substantive argument, the chapter on sovereign authority, relies on Johnson’s reading of the Thomistic just war and provides a conventional analysis rooted in close textual assessment and logic, its second stage, the chapter on liability as manifest in the criteria of just cause and right intention, relies on Thomistic casuistry. The reason for this two-stage argument is that, with regard to sovereign authority, textual analysis is the most effective way to contrast the Thomistic conceptualisation with the revisionist and Westphalian understandings and, following from that, make an assessment with regard to the authority to conduct targeted killings. In this regard, Johnson, as arguably pre-eminent historian of the just war, provides the most succinct history of sovereignty on which the authority chapter can build its argument.

As far as liability to targeted killing is concerned, however, due to the key role of the virtues in Aquinas's ethics, this thesis parts with Johnson's reading of St Thomas and introduces Thomistic casuistry which is also its original contribution to the methodological aspect of just war thinking. In addition, the chapter points out how Thomistic casuistry can avoid potential shortcomings of the traditional casuistical method. St Thomas's account of the virtues, it will be argued next, can also be helpful with regard to the heated debate about thought experiments in contemporary normative political theory. The final section of this chapter provides a discussion and response to criticism brought against the historical approach generally and to potential criticism of Thomistic casuistry in particular. Concluding with an exploration of the concept of just war tradition the chapter argues that despite fundamental disagreements between various just war approaches, the tradition is broad enough to have a place for all of them.

### **3.1 Walzer's Just War**

Over the last four decades, Michael Walzer has arguably been the most influential advocate of just war thinking. Walzer's seminal work, *Just and Unjust Wars*, first published in 1977, remains widely read today and its arguments have triggered considerable debate. In the following, Walzer's understanding of just war will be appreciated as his method, in addition to his moral argument, caused a revisionist critique which aimed at revealing the logical flaws in his theory. In the preface of his book, Walzer emphasises that the way he sees the morality of war is unlike the way political or moral philosophers see it. For him, the condition of war is so dire that it seems irreconcilable with the enterprise of philosophical reflection. In consequence, Walzer "expresses ignorance about the foundations of ethics" (Boyle 1997, 85) as, in his own words, his "main concern is not with the making of the moral world but with its present character" (2015, xxii). In his opinion, it is the here and now that matters

and if he were to contribute to the debate about the foundations of ethics, he would probably get lost in that debate. As a result, he describes his book as one of a “practical morality” as he does not directly engage “the most profound questions of moral philosophy.”

In addition, he argues that the correct method for practical morality is casuistical. Walzer seeks to consider historical cases in order to derive judgements and justifications from them, emphasising the value of the experiences men and women make during war (2015, xxii-xxiv). In particular, Walzer objects to the approach of international lawyers who, no matter the circumstances, uphold the “legalist paradigm,” built around the core principles of states’ rights to political sovereignty and territorial integrity. Discounting the work of lawyers as “utopian quibbling,” Walzer (2015, xxiv-xxv) argues that “Legal treatises do not, however, provide a fully plausible or coherent account of our moral arguments, and the two most common approaches to the law reflected in the treatises are both in need of extra-legal supplement. (...) The lawyers have constructed a paper world, which fails at crucial points to correspond to the world the rest of us still live in.” According to Walzer (2015, 86), morality demands that the legalist paradigm cannot be sacrosanct and that there must be certain “rules of disregard.” It is his work as moralist to consider when the legalist paradigm should be abandoned. Arguing for exceptions to the legalist paradigm, Walzer’s practical morality does not associate itself with any one school of morality (Glennon 2013, 118). Rather, according to Glennon (2013, 120), Walzer suggests a “philosophical hopscotch” which integrates various approaches, including one of individual rights which gives rise to the rights of states, as well as utilitarianism.

Having noted Walzer’s criticism of the legalist paradigm, however, he himself at times employs a legalist reading of the just war as he takes the legalist paradigm as his default position. As a result, he has an uneasy relationship with the classical just

war which precedes the legalist paradigm and is the historical source of the laws of war. In particular, arguably due to his background as democratic socialist political philosopher, Walzer seems to have little interest in engaging with the mainly Christian roots of the just war (Brown 2018, 205). As Walzer (2015, xxvi) puts it himself:

My own work, then, looks back to that religious tradition within which Western politics and morality were first given shape, to the books of writers like Maimonides, Aquinas, Vitoria, and Suarez – and then to the books of writers like Hugo Grotius, who took over the tradition and began to work it into secular form. But I have not attempted a history of just war theory, and I quote the classical texts only occasionally, for the sake of some particularly illuminating or forceful argument.

Importantly, these Christian beginnings emphasised that positive law, although doubtlessly important, was subject to the higher natural law (Biggar 2013a, 15). Although Walzer objects to lawyers' literal treatment of the legalist paradigm and he considers positive international law as "radically incomplete" (2015, xxvi) critics charge that Walzer builds his account around the bedrocks of the legalist paradigm and the domestic analogy which subsequently "do the opposite of what his opening preface suggests" (Rengger 2005, 150). While Lazar's (2017a, 38) view that Walzer's "central commitment is to provide moral foundations for international law as it applies to armed conflict" is perhaps too narrow, nonetheless, in parts of Walzer's reasoning, international law takes on the function of a "frame" (Johnson 2014, 5) through which he sees the moral world. At times, the frame of international law leads him to argue against some of the most important and arguably commonly accepted moral principles such as the requirement to discriminate between the guilty and the innocent as he does in his controversial argument for the moral equality of combatants.

Unsurprisingly, Walzer's just war theory has been critiqued as being under the threat of falling into the traps of conservatism and relativism. The trap of conservatism entails that Walzer removes the critical function of just war in that he starts his assessment of the morality of war from the vantage point of the current state



of the legality of war. At the same time, however, Walzer's just war theory may be considered to be relativist in the sense that his moral argument follows the development of the legality of war and thus emphasises changes in international society over moral principles (O'Driscoll 2008a, 96-98). To sum up, while Walzer reasons from "historical illustrations" he does engage with the historical just war tradition in a limited way only. In contrast, he takes the legalist paradigm as his starting point and either defends or argues for exceptions to it.

In addition, Walzer also seems to commit what Coates (2016, 28) has called the two principal forms of casuistry's abuse, the problem of being either too deductive or too inductive. The problem of being too deductive, related to the general critique of Walzer's casuistry discussed above, means that principles are articulated before turning to circumstances and the consideration of circumstances that follows makes no contribution to the principles as such. This "abuse" can be encountered in Walzer's very embrace of the legalist paradigm, a set of principles and rules he takes as his baseline for moral analysis. As a result, at times, his "historical illustrations" seem to be illustrative only, merely serving the function of justifying the legalist paradigm's conclusions. It seems that he had already arrived at those principles before he even considered the historical circumstances, one possible example being his argument for the moral equality of combatants which puts him at odds with both the classical and the revisionist positions.

Traditional casuistry, however, as Coates (2016, 28-29) notes, is an "experiential' method" in which the cases are more than mere embellishment; "(...) it is a way of articulating, testing and refining principles in light of a moral experience shaped by changing social and historical circumstances." The exact opposite takes place when Walzer's casuistry is too inductive. In this type of abuse circumstances are given excessive weight resulting in a willingness to sacrifice well-established moral principles (2016, 29). The prime example for this type of reasoning is his argument

for a “supreme emergency” (Walzer 2015, 250-267). Here, Walzer, due to the particular threat posed by Germany during parts of WW II, is willing to abandon one of the just war tradition’s core precepts, namely the idea of non-combatant immunity. The argument for supreme emergency, too, can be reconciled with neither the classical nor the revisionist just war. Finally, Walzer’s casuistry, in contrast to traditional casuistry, does not reason from a paradigm case. Historical casuists took a case whose solution had been commonly accepted as either correct or incorrect as their point of reference and compared it to novel cases that seemed morally dubious. Walzer, in contrast, takes the legalist paradigm which itself has been the product of reflection about historical circumstances as his starting point for moral analysis.

### **3.2 Walzer’s Revisionist Critics**

Walzer’s interpretation of the just war has been challenged ever since he first put forward his argument in 1977. While four early critics (Beitz 1979; Doppelt 1978; Luban 1980; Wasserstrom 1978) caused “cracks” in his theory, during the last twenty years, according to Walzer’s most prominent revisionist critic today, Jeff McMahan (2012b), the cracks “have widened into gaping crevices.” The revisionist account has been put forward by philosophers working within the analytical tradition who have meticulously scrutinised Walzer’s argument. In particular, they accuse the Walzerian just war of having “so far failed to articulate a rigorous, detailed, theoretically unified, and plausible account of the resort to war” (McMahan 2014, 242).

Most revisionists would describe themselves as working on the ethics of war, rather than, as Walzer does, on just war theory. Their main concern is to write novel philosophy on war-related issues such as the ethics of harming, the duty to save, or political authority. Relying on Rawls’s method of reflective equilibrium, they take Walzer’s just war idea as the ruling theory that must be checked for logical

incoherence with the goal of constructing a better theory. In Lazar's (2017b, 114) words, analytical philosophers

(...) develop moral arguments by taking our considered judgments about the permissibility of actions in particular cases and trying to identify the underlying principles that unify them. We then take those principles and test how they apply to other cases, real or hypothetical. If the principles generate conclusions that conflict with our considered judgments about those cases, then we must revise either the principles or our judgments. As our project evolves, and we revise our principles in light of our judgments and our judgments in light of our principles, we approach reflective equilibrium (the underlying standard of epistemic justification is coherentist).

In order to arrive at the state of reflective equilibrium, most revisionists rely on thought experiments quite different from the "historical illustrations" Walzer employs in his type of casuistry. Frowe (2014, 4) describes the ostensible merits of "simple" and "fantastic" cases as follows: "They are simple so that we can more easily isolate the variables that influence our intuitions about whether a person may use force in a given case, and more easily compare and contrast the cases with each other. They are fantastic so that we can cover a wide range of situations and thus more thoroughly test our intuitions and principles." This "theoretical bias against the historical or contingent" (Coates 2016, 9-10) is the direct result of their abstract methodology. As Frowe (2014, 4-5) clarifies, revisionists see the practicality of philosophy "not solely in its ability to churn out answers to particular real-life cases. (...) philosophy's practicality can sometimes lie in its ability to clarify our ideas and our thinking before we get to the level of real life, and this is often best achieved by being one or two steps removed from real-life cases. Stripping away the detail can enable us to identify general principles that can be obscured by the intricacies of historical cases."

The primary target of revisionists is the prominent role Walzerians award to the state. Rejecting the domestic analogy, revisionists allocate moral responsibility for killing in war to individuals, not states. They hope to discredit Walzer's just war theory which they describe as "a very state-based, collectivist approach to war" and argue for

a “reductive individualism” which is reductivist as a result of the assumption that the rules which regulate killing in war are the same as those regulating interpersonal killing outside of war (2014, 13). The central argument of reductivism is that there exists only one set of moral principles which applies all the time, rather than distinct principles for different moral domains such as war and peace. Put differently, while Walzer starts by thinking about war, revisionists start by thinking “about the ethics of killing outside of war, then apply those principles to the case of war” (Lazar 2018, 35). Revisionists are likewise individualists due to the claim that moral theory must concentrate on individuals rather than collectives such as, for example, nation states (Frowe 2014, 13). Having said that, it should be noted at this point that not all revisionists are reductivists. Noteworthy exceptions are, for example, Lazar (2010) and Renzo (2013) who are both revisionists and exceptionalists. Revisionists argue against central claims of Walzer’s theory including the logical separation between the *jus ad bellum* and *jus in bello*, the moral equality of combatants, and the immunity of non-combatants.

### **3.3 Walzer’s Response to Revisionists**

In some respects, the differences between Walzer’s “traditional” just war and the revisionists are those between political philosophy and moral philosophy approaches (Lazar 2017a, 41). Walzer (2014, 104) is proud to acknowledge this as his “(...) subject has always been politics; I have tried to respond to the political issues of my time; I have joined the arguments that my fellow citizens were engaged in. And I mostly haven’t worried if my responses didn’t add up to a coherent theory.” For Walzer, today’s just war debate falls into two camps. First, his camp which considers just war theory to be about war and, second, the revisionist camp which considers just war theory to be about moral philosophy. Walzer sees little practical significance for what McMahan calls the “deep morality of war.” Due to mainly consequentialist reasons, as

McMahan (2006, 40) acknowledges himself, his deep morality might have to retreat behind the laws of war and the former might only take on the function of guiding the individual conscience. Following from this concession, Walzer as advocate of a practical morality delegates much of the revisionist just war theory to the academic ivory tower. Walzer feels uneasy about this type of academic discussion so different from the way he himself works. “Many of these theorists take the view that issues of this sort can be delineated most clearly and addressed most conclusively in contexts far removed from war and even in hypothetical and elaborately constructed cases that have no historical or practical reference at all. So they have no need to read, say, military history; the debate is focused elsewhere, and all that is necessary is to read the works of the other participants in the debate” (Walzer 2015, 336-337). The problem, in Walzer’s view, is that it is the philosophical purpose only that matters to these theorists and that it is the “cleverness of the design” (2015, 337) that counts rather than addressing moral questions soldiers face in war.

In order to figure out the rules, they may start from the cases, playing with them, changing their details, even inventing possible and impossible variations that test our understanding of the rules as they are, or as they might be, or should be. But these theorists have no commitment to the actual cases until they know the applicable rules, and hypothetical cases will do just as well in figuring things out – perhaps better, since they impose no reality constraints on their designers. (2015, 337) (...) And I worry that theorists who focus on these kinds of cases aren’t thinking about war at all. They are not interested, or not sufficiently interested, in what actually happens on the battlefield and what it feels to be there. (2015, 344)

Elsewhere (2006c, 43) Walzer was even more explicit about his rejection of revisionist’s analytical construction, referring to McMahan’s illustrations as “a little too fine for my head.”

In consequence, Walzer’s passionate defence against revisionists mainly seems to rest on the claim that their thinking is of no practical use. As will be pointed out later, such an impractical understanding, Walzer is right to note, violates one of the two key precepts of just war thinking as it has been understood historically.

However, and ironically perhaps, despite Walzer's strong objection to revisionist just war thinking, his own reasoning has a major similarity with his critics, namely the violation of the second pole of the historical tradition, its inherently historical nature. As noted above, Walzer himself acknowledges that his interest in the origins of just war argument is limited and adopts the legalist paradigm as his moral baseline.

Given the fundamental disagreement between Walzerians and most revisionists about the usefulness of history for moral analysis it seems impossible to achieve a methodological reconciliation. As the analytical just war seeks to discover the moral truth it has no interest in dealing with real-world cases and resorts to abstract thought experiments instead. Attempts to make the methodological crevices between the camps less deep, although praiseworthy, will not lead very far. For example, Thaler (2016) who distinguishes between productive and unproductive hypotheticals has made such an attempt. The problem with such bridging accounts, however, is that both sides would have to compromise parts of their core assumptions. In order to arrive at productive hypotheticals revisionists would have to make their cases more like real-world cases while casuists would have to simplify their presentation of cases. The conclusion thus must be that both camps will have to agree to disagree about method. Having said that, however, despite various disagreements about method these should not be taken as reason not to participate in debate about substantive questions.

### **3.4 The Historical Approach as “Third-Way”**

Walzer's casuistical method shares one of the two pillars of the historical approach, namely the emphasis of historical circumstances and the lessons which can be drawn from these. It is this pillar of a “close linkage of decision-making and concrete action” (Reichberg 2018, 65) which most revisionists lose when they elaborate on unrealistic

thought experiments. Unsurprisingly, in contrast to revisionists, classical thinkers like St Thomas did not seek to develop detailed rules of appropriate conduct. Aquinas's economy on rules, as Coates (2016, 10) notes, was not at all a sign of underdevelopment. Rather, it was the direct expression of an understanding of just war that stressed the contingent in decisions taking place in the heat of battle. That is why Aquinas developed a sophisticated virtue ethics account that enabled soldiers to habitually act in accordance with the virtues, making a highly developed set of specific rules unnecessary. As Reichberg (2018, 65) points out,

(...) the reflection was inherently practical in the sense that it was meant to inform the conscience of individuals who, in one way or another, had contact with war. Hence, Aquinas situated his analysis of just war within a concrete treatment of the moral virtues, and his Dominican predecessor Raymond of Peñafort elaborated a just war casuistry (...) that was specially geared to the needs of the confessional. (...) Neither in Grotius nor in his predecessors do we find a purely deductive approach to the normative issues of war (with an imaginative modelling of cases replacing historical reflection), as has become prevalent today in philosophers of the analytical school.

It does not surprise, then, that one of Aquinas's three just war criteria, the criterion of right intention has arguably been neglected by revisionists. While one does not have to go as far as Coates (2016, 11) who considers right intention as St Thomas's most important just war principle, the difference between the revisionist understanding and that of Aquinas is striking. Revisionists basically see the requirement of right intention as making sure that the end of the war is in line with just cause, implying that right intention is redundant as distinct principle (2016, 11). Unsurprisingly, Frowe (2016), in her revisionist treatment of *jus ad vim*, does not address the criterion of right intention at all. The classical just war of St Thomas, however, linked the belligerents' moral dispositions to the idea of just cause. Consequently, Coates (2016, 11) argues that, first and foremost, justice in war is determined by the moral dispositions of the belligerents. "Virtues and vices, rather than rules and principles, are the real determinants of the moral outcome of war. They represent the moral capacities (or incapacities) of belligerents. They are the moral

habits or powers which make up the moral character of the individual and which incline or dispose the moral agent to act in certain ways. Neither just conduct nor unjust conduct can occur without such empowerment.”

As Coates (2016, 12) notes, analytical or reflective moral approaches oppose moral dispositions on principle as the stress on the moral character of the agent clashes with the emphasis on reflective and rule-based moral reasoning. Simply put, for revisionists, only a mind without moral dispositions is capable of rational reasoning. The problem with analytical just war theory, for an advocate of the historical approach, is that war is no reflective activity. War as an unforeseeable endeavour is unsuitable for imposing meaning on it from outside through abstract reasoning (2016, 13-14). As Coates (2016, 14) quotes Aristotle: “Acts that are foreseen may be chosen by calculation and rule, but sudden actions must be in accordance with one’s state of character.” In line with St Thomas who stressed the functions of the intellect and the will, Coates (2016, 15) stresses that moral agency is both cognitive and volitional. Thus, even if a person knows the right action this does not necessarily mean that he or she acts accordingly. Consequently, the moral agent needs rightly-ordered virtues so that she wills the right that her intellect has discovered. The analytical just war, due to its reliance on rules, neglects the function of the will. Revisionists assume that reason has a self-motivating power (2016, 15).

While Walzerians share the historical just war’s concern for the contingent they do not fully appreciate the second pillar of the historical approach, namely its engagement with the ideas of previous thinkers. Most revisionists go much further than that by openly admitting that they see little value in engaging with the work of past thinkers generally and the work of religious thinkers in particular. Consequently, despite the differences between the “traditional” Walzerian and revisionist just war approach both have something in common that sets them apart from the historical approach. As O’Driscoll (2013, 49) points out, Walzer’s theory which has no prominent place for the history of just war has been carried on by revisionist just war



theorists who seek to avoid engaging the historical development of the tradition, pursuing a more analytical approach regarding its principles. While Walzer justifies his theory through real-world examples and shuns revisionists for their reliance on artificial thought experiments he, too, is subject to the charge of neglecting history through his marginal interest in the just war tradition. Put differently, his “practical morality” is built around an analytical understanding of the role of history which differs markedly from the historical approach which seeks to create continuity between past and present.

The historical approach, as found in the work of thinkers like Joseph Boyle, John Kelsay, Cian O’Driscoll, Gregory Reichberg, Nicholas Rengger and, most prominently perhaps, James Turner Johnson, holds that “the best way to acquire a deep understanding of the ethical categories invoked in relation to war is to study their formation and usage over time. By revealing the historical range and content of these categories, this form of inquiry both attunes us to their particularities and equips us to adapt them to contemporary circumstances” (2013, 50). Here, thinkers do not consider the work of their predecessors to hold limited value only but fully engage with it. In Johnson’s (2007, 4) words, “To reflect morally on war is to enter the historical stream of moral reflection on war and seek to learn from it, not seek to escape it to some more abstract level.” Walzer, in contrast, seeks to “divorce *just war past* from *just war present*” (O’Driscoll 2013, 50).

Importantly, this does not at all mean that inherited principles may not be challenged: “The point is that cultivating a sense of the past need not enslave us to it. Rather, the hope must be that it will bestow upon us a deeper, more variegated perspective on the challenges we face today” (Brunstetter and O’Driscoll 2018, 2). For example, St Thomas Aquinas, the key figure in the systematisation of classical just war thinking, came to his conclusions about whether any war could be just through dialectically linking his own position to the particular opinions of his predecessors. As

Reichberg (2018, 60) notes, thinkers like Aquinas started with historical thinking about the ethics of war before analysing particular issues for their own sake: “The classical theorists of just war understood that our reasoning about the rights and wrongs of war would only be as good as the premises that form our point of departure. On their view, theoretical reflection would be strengthened through the examination of positions articulated by earlier thinkers. Thereby set in motion was a comparative hermeneutic in which earlier positions were reviewed, not so much out of historical interest, but rather for the didactic purpose of grounding sound reasoning about issues of contemporary import.” For classical thinkers, as well as for today’s advocates of the historical approach to just war, this approach had several benefits: “it widened the range of available premises and thereby directed the theorist’s attention to issues that might otherwise go unnoticed, it facilitated self-reflection by bringing into greater relief the theorist’s own cherished assumptions, it showed how a single premise could be drawn towards very different and even opposing conclusions, and it explained the appeal of errors that were operative in contemporary practice, thereby enabling their persuasive refutation” (2018, 60). It is quite indicative, then, that, as Reichberg (2018, 64) points out, classical just war thinkers did not consider themselves theorists. Even Grotius, the first thinker to actually do so, differed markedly from the attitude of today’s analytical thinkers: “Yet, unlike Descartes, who several years later would seek to construct a new science of ‘first philosophy’ from scratch, Grotius was at pains to demonstrate that his juridical science of war and peace was not a construct born of his own mind, but rather a discipline that emanated from a set of pregiven norms (*jus naturae* – natural right) that had already been acknowledged by a broad array of Greek, Roman, and Christian thinkers.”

Seen from the perspective of the historical approach the problem with Walzer’s just war is not that he employs a “philosophical hopscotch” (Glennon 2013, 120). In fact, St Thomas who, in his influential summary of the just war consensus of his day, articulated a tradition “which had been shaped by philosophical, theological, and

political thinking on natural law, by military thought and practice, by legal traditions reaching back into Roman law, and by accumulated experience in the government of political communities” (Johnson 2013a, 25). Rather, the problem resides with his limited interest in the development of the just war tradition. Likewise, although revisionists come to conclusions similar to earlier advocates of the just war as, for example, in their insistence that there can be no moral symmetry, their thinking, nonetheless, is difficult to square with the historical just war. Claims (see, e.g., McMahan 2012b) that revisionists are recovering the older tradition are thus valid only to the extent that they reach the same or similar conclusions as the ancients.

The historical approach to just war reasons differently. For example, Johnson’s approach which, not unlike Walzer’s, relies on a casuistical analysis of historical circumstances demonstrates that there is value in considering the work of previous thinkers. Johnson (1979, 98-99) describes the moralist’s task as one of “keeping faith,” “that the moral life of the individual in one of these religious traditions must be one in which ethical guidance comes from the effort to keep one’s reflections and decisions faithful to those of others who have gone before and whose examples are remembered by the believing community as normative ways of doing the will of God.” It must be noted that while Johnson is speaking for the Christian moralist here, for him, the task remains the same for moralists operating within secular moral communities. In fact, in the same article (1979, 109-114), Johnson explains how the just war tradition constitutes such a moral community. In his historical work, Johnson takes the medieval consensus on just war as his starting point and investigates how the unfolding of history required changes to the inherited tradition. Regarding his own just war argument, Johnson goes back to Aquinas’s summary and investigates what can be learned today from the wisdom of the medieval consensus. In his own words (2009, 246), his work “has been focused on the tradition that has developed and carried this idea historically and the implications to be drawn from this tradition of just war for present-day reflection and, maybe, practical decision-

making.” “(...) my historical investigations are about moral traditions and their implications in particular historical situations, and my efforts at applied ethics proceed by extrapolating from how just war tradition was applied in such historical situations to how its meaning should be understood in present contexts” (2009, 247). As Kelsay (2009, 180) notes, for Johnson, thinking about ethics is “fundamentally historical” while his “type of practical reasoning,” at the same time, does not deny a place to moral principles and rules. While such reasoning at times may seem like an attempt at “commanding the headwaters of tradition” (O’Driscoll 2008b), Johnson fears that neglecting the history of just war argument leads to a moral loss.

### **3.5 The Historical Approach as Trigger for Substantive Debate**

One of the main points of disagreement between Walzerians and revisionists is about the question whether the concept of a moral equality of combatants is ethically defensible. Calling it “perhaps the strangest rule of war” (2015, 346), Walzer essentially argues that in war it does not make a difference whether or not the cause a soldier is fighting for is just. Following the laws of war, Walzer holds that during war just and unjust combatants are each other’s legal *and* moral equals. In his own (2015, 36) words: “It is the sense that the enemy soldier, though his war may well be criminal, is nevertheless as blameless as oneself. Armed, he is an enemy; but he isn’t *my* enemy in any specific sense; the war itself isn’t a relation between persons but between political entities and their human instruments. These human instruments are not comrade-in-arms in the old style, members of the fellowship of warriors; they are “poor sods, just like me,” trapped in a war they didn’t make. I find in them my moral equals.” Once in a state of war, a state of exception during which a different morality applies, soldiers, as instruments of their collective, are mostly liberated from the moral responsibility to judge the justice of his or her collective’s war.

Revisionists are unwilling to let soldiers off the moral hook so quickly. They argue that soldiers fighting for the unjust side cannot be the moral equals of soldiers fighting for the just side based on the determination of just cause. Starting from the principle of individual self-defence, the only instance for which individuals may resort to lethal force, revisionists reason that the only legitimate just cause for war is self-defence. In consequence, if a state goes to war without having been attacked, it lacks just cause and there are thus no legitimate targets for its soldiers. McMahan essentially argues that unjust combatants who kill just combatants commit a crime equivalent to murder in everyday life. It goes without saying that revisionists arrive at the rejection of the moral equality of combatants by employing their particular method.

As will be pointed out shortly, the moral equality of combatants, although defended by Walzer, was alien to classical just war thinkers. The root of this divergence lies in Walzer's interpretation of the just war. Due to his limited interest in engaging with the just war tradition he follows the legalist paradigm as his default position and incorrectly seems to equate legal and moral equality. Revisionists have uncovered this morally problematic simplification. Having said that, however, in order to detect the problematic nature of this argument it is not necessary to resort to the mostly ahistorical way of reasoning the analytical camp employs. Rather, as the next section demonstrates, a historically aware just war aligns with its revisionist critics on the issue of the moral equality of combatants.

### **3.5.1 The Historical Approach and the Symmetry Thesis**

A historical reading of the just war essentially vindicates the revisionist position on moral symmetry but also shows that, in order to prove Walzer wrong, it is not necessary to resort to analytical construction. Before demonstrating how Walzer's employment of the legalist paradigm vis-à-vis the moral equality thesis is problematic a few words must be said about the inherent connection between just war argument

and positive international law. Both are “historically conditioned realities” which, on their own, “provide particular perspectives for reflection, policy, and action relating to world order, but at the same time they interact with each other” (Johnson 2017, 453). As far as the (legal) equality of combatants is concerned, there were important historical reasons for thinkers like Vitoria and Grotius to argue for what Johnson (1975, 20) has called a state of “simultaneous ostensible justice” in which, due to the difficulty of determining whose side’s cause was just, both sides’ belligerents should fight in strict observation of *jus in bello* restraints. These thinkers “renegotiated” the just war tradition in the direction of granting equal rights to combatants on both the just and unjust side. As Johnson (2017, 458) notes, “Grotius’s thinking on the consensual limits to conduct in war was, for practical purposes, the beginning of the idea of a law of armed conflicts as rooted in European cultural standards.” However, what these thinkers did not do is break with the conviction that objectively at least one side had to be in the wrong. Put differently, they paved the way towards legal equality while continuing to deny the notion of moral equality.

Consequently, Walzer loses something by taking the legalist paradigm as his starting point. Upholding that paradigm without revisions in his argument for a moral equality of combatants, he seems to equate legality and morality. As Reichberg (2018, 71-74) demonstrates, Walzer’s claim that the moral equality thesis is part of the classical just war is thus mistaken. There was, in fact, a group of classical thinkers, the so-called camp of “regular war,” which argued for a logical separation between *jus ad bellum* and *jus in bello*. However, these thinkers cannot be considered as advocates of the just war.

What, then, should be made of Walzer’s seeming equation of legality and morality vis-à-vis the moral symmetry thesis? Given that Walzer set out to argue for a “practical morality” it seems that the relationship between legality and morality in his work is a result of his pragmatic account of just war. Rather than being a result of

his downplaying of previous thinking Walzer might be read as making this choice for a deliberate philosophical reason. In particular, it seems that Walzer, in his defence of the moral symmetry thesis, is stressing a key element of the just war tradition, namely the reminder that even one's enemy never ceases to be a human being. This concern for the "poor sods" like, for example, German soldiers who were forced to serve in the Wehrmacht although they despised Hitler's ideology, seems to undergird Walzer's reasoning. Those soldiers were "trapped in a war they didn't make" and the result of acting in accordance with their conscience would have been the death penalty. It is this sensibility to the moral conundrums of war which leads Walzer towards his embrace of the moral equality of combatants.

Importantly, the classical just war was not at all dismissive of the reasoning which lets Walzer arrive at the moral symmetry thesis. For classical thinkers, granting equal rights to both the just and unjust side, on first look, amounted to a violation of natural right (*ius naturale*). However, Aquinas, centuries before Vitoria and Grotius, acknowledged that "the dictates of human positive law (*lex humana*) do not entirely overlap with those of natural law (*lex naturale*)" (Reichberg 2017, 240). As a result, St Thomas could imagine cases in which unjust combatants, while still contributing to an act of injustice, were morally blameless and should thus not be prosecuted. In other words, while there could never be a moral equality as advocated by Walzer, there might be, depending on the circumstances, reason to grant equal rights. "That said, the fact that Christian tradition maintains a basically moral, punitive justification of war and of killing does not preclude it logically from endorsing laws of war that accord equal *legal rights* to all combatants. The justification for this is at once practical and moral: namely to stop the conduct of war from spinning out of all moral control, and so to limit its evils. This does not imply the logical impossibility that the same belligerency can be both just and unjust at the same time" (Biggar 2013a, 196).

Furthermore, the manoeuvring between natural law and human positive law which gave rise to the legal equality of combatants is a testament to the historical connection between just war thinking and statecraft. In contrast to revisionists who concentrate on individual rights, a classical thinker like Aquinas was “far more interested in political duties and obligations of the individual in society than in the political rights and privileges to which the individual lays claim” (Crofts 1973, 166). The foremost goal of statecraft was the common good which meant that the sovereign, who had the responsibility of accomplishing that goal, had a very special role. “Within this frame specialists in moral thinking, along with specialists working from other perspectives, may (and should) offer advice, but final judgment rests with the sovereign, because the responsibility for the good of the community rests on him (or her or, in rare cases, them)” (Johnson 2013b, 24). Unsurprisingly, given the objection of many revisionists (see, e.g., Fabre 2008; Steinhoff 2007) to the sovereign authority criterion, they lose the connection between just war and statecraft emphasised by classical just war thinkers. Walzer, in this regard, is closer to the classical understanding. He continues to argue for the criterion of “legitimate authority” although, of course, his conceptualisation of the criterion differs from the classical understanding.

To sum up, for the classical just war there may be reasons to grant equal rights to combatants on both the just and unjust side, but they would not face each other as moral equals. Thus, the historical mode of just war sides with revisionists regarding the moral equality of combatants. On top of that, putting this agreement on a broader basis, the historical mode of just war can be read as giving support to the revisionist idea of a distinction between a “deep morality of war” and the laws of war. For example, McMahan (2006, 40) implies that the laws of war may have to be “action-guiding” while the “deep morality” may have to be limited to functioning as “a guide to individual conscience.” There are thus curious parallels between the revisionists’ manoeuvring between the “deep morality of war” and the laws of war on the one hand



and classical thinkers' distinction between *lex naturale* and *lex humana* on the other although both sides are very much at odds with each other in terms of methodology.

### **3.6 Recapturing Traditional Casuistry for Just War**

#### **Debate**

The following section prepares the ground for the method this thesis employs in its chapter on liability to targeted killing. Importantly, traditional casuistry integrates both pillars of the historical approach and, by following a number of fixed steps, approximates the analytical rigour of revisionists. While both Walzer and Johnson argue casuistically in the sense that they reflect on historical cases it will become apparent that traditional casuistry is quite a different way of reasoning.

The method of casuistry has a long history during which it both dominated moral discourse but also fell out of favour for considerable periods of time. It is no ethical theory in the sense of Kantianism or utilitarianism because it neither tries to advance a comprehensive account of ethics nor does it constitute an account of how ethical decisions are ultimately grounded (Strong 2000, 330). Rather, it is a method “grounded in the wisdom of the Jesuits in the Middle Ages, the clinical experiences of modern bioethicists, and the practical judgments of plain persons” (Tremblay 1999, 492). Particularly since the 1960s, caused by developments in medical ethics, casuistry has had a revival of which Walzer’s *Just and Unjust Wars* was one part. Jonsen and Toulmin (1988, 257) provide a definition of casuistry as “the analysis of moral issues, using procedures of reasoning based on paradigms and analogies, leading to the formulation of expert opinions about the existence and stringency of particular moral obligations, framed in terms of rules or maxims that are general but not universal or invariable, since they hold good with certainty only in the typical conditions of the agent and circumstances of action.”

Casuistry starts with the morphology of a case, “the interplay of circumstances and maxims.” The circumstances are the “who, what, when, where, why, how, and by what means” of a case. Circumstances, however, do not constitute a case’s core. That position falls to a case’s maxims, “brief rule-like sayings that give moral identity to the case.” Such maxims can be expressed in several ways as for example through ethical principles, rights, duties, or virtues (Strong 2000, 331). As Jonsen (1991, 298-99) explains, it is the work of the casuist to, besides identifying the maxims present, judge which maxim should govern the case and, eventually, whether the maxim needs to be adapted or replaced. For example, the discussion of the criterion of just cause will start with the maxim that self-defence is the only just cause. This is the maxim which seems to have ruled the arguably commonly accepted Yamamoto paradigm (see section 5.1). The discussion then moves on to less clear cases questioning whether the maxim still rules under different circumstances or whether it needs to be adapted. As this thesis revisits the Thomistic just war, the principles for the casuistical analysis will be taken from Aquinas’s account of Christian ethics. Granted, taking Christian moral principles as baseline of analysis will inevitably lead to the charge of moral particularism. However, it seems questionable that there can ever be morally “neutral” interpretations in the first place and, arguably, just war debate would benefit from a conversation between its different participants. For a thoughtful discussion of the relationship between religious and secular approaches see Biggar (2013b, 49-50).

The next step is to line up cases in a certain order, the taxonomy of cases. The casuist starts the taxonomy with the so-called paradigm case. This case’s resolution is accepted as either morally appropriate or rejected as clearly wrong. “This would be a case in which the circumstances were clear, the relevant maxim unambiguous and the rebuttals weak, in the minds of almost any observer. The claim that this action is wrong (or right) is widely persuasive. There is little need to present arguments for the rightness (or wrongness)” (Jonsen 1991, 301). The use of a paradigm case shows that casuistry is not a deductive approach of the kind of applied ethics approaches such as

principlism (see, e.g., Beauchamp and Childress 1994) which simply apply moral theories to cases. In contrast, the argument is developed through a comparison of the paradigm case with other, less clear, cases. In this sense, it is more of a “bottom up” inductive process which employs a settled paradigm case in order to make judgements regarding novel cases (Calkins 2014, 4).

Having said that, however, the type of casuistry this thesis employs is not the “‘hard-core’ intuition-based ‘new casuistry’” which, as Arras (1994, 1002) argues, Jonsen and Toulmin initially advocated and that “has little, if any, use for either principles or higher level theory.” Rather, this thesis returns to traditional casuistry which seeks a balance between general moral principles and particular circumstances. In other words, the type of traditional casuistry this thesis employs “(...) acknowledges the importance of virtue and character, with special emphasis on practical wisdom and judgment. It melds these insights, though, with a recognition of the importance of cases and context in moral thinking, in a process that offers better concrete guidance to those who must ‘practice philosophy’” (Tremblay 1999, 492). In this sense casuistry “is synonymous with practical reasoning” (Jonsen 2005, 53) and thus conforms to the inherently practical nature of the historical just war idea. Jonsen, in his definition of practical reasoning, hints at the tension between general principles and circumstances any casuist must grapple with: “Practical reasoning is a phrase used in Western moral philosophy to designate the intellectual process whereby an agent deliberates and decides about a particular course of action. Since moral decision and action is formulated in the light of some sort of general principles, applicable to all similarly situated agents, particular agents must determine how those general principles apply to the specific situation in which they will act.” For example, the early Church, where Jonsen situates the beginnings of casuistry, had to distinguish between “counsels of perfection,” encountered in the word of Jesus, and “moral imperatives” listed in the Decalogue. In fact, the Christian just war tradition is the very result of such a casuistry. For example, St Augustine’s reflections on just war were aimed at

reconciling Jesus's teaching on nonviolence with the Decalogue's demand of love of neighbour. While there is no room here to provide a detailed history of casuistry it must be noted that the canonists and theologians of the medieval period, including St Thomas, relied on multiple sources regarding the general principles that had to be reflected upon in the light of current circumstances: the Bible, the Church Fathers, decrees of Church councils, and the theory of natural law (2005, 56).

A contemporary illustration of a "renegotiation" of inherited moral teaching in the light of novel circumstances can be found in the Catholic debate about the question whether divorced believers who remarry should be allowed to receive Holy Communion. Pope Francis has arguably broken with prior Church teaching which held that marrying a second time after having been divorced constitutes the grave sin of adultery which makes the respective person unworthy of receiving the Eucharist. If certain conditions have been met, the pope has been interpreted to argue that remarried believers should not be denied Holy Communion. This decision, controversial within the Church, asks for a close investigation of the circumstances of each remarried person. At the end of such a casuistical analysis it may be concluded that the principle of the inviolability of marriage should not stand against reception of the Eucharist. For traditional casuistry, balancing general moral principles and the demands of particular circumstances is fundamental and requires "intellectual ingenuity," which constitutes "the heart of any casuistry" (2005, 58). That is why St Thomas Aquinas, arguably one of the intellectual fathers of the later method of casuistry (Jonsen and Toulmin 1988, 123), distinguished between natural law and human positive law, a distinction which, as was noted above, resulted in the argument for a state of "simultaneous ostensible justice."

Next in the taxonomy belong cases that are not as clear as the paradigm case and allow for second thoughts about the rightness or wrongness of the action taken. In each case under consideration, the casuist raises the question whether the changes

in circumstances require an adaptation or even replacement of the maxims identified initially. It goes without saying, then, that the cases under consideration must be portrayed in sufficient detail. Particularly instances of the use of lethal force and the decision-making leading up to them are often complex. Simplifying the portrait of cases has a negative impact on their purchase in moral evaluation. Having completed the taxonomy, the casuist, then, can reach the verdict. Approaching the conclusion, casuistry pays attention to the “kinetics” of a case. The casuist tries to identify the “moral movement” the case imparts on other cases (Jonsen 1991, 303). In order to detect this movement, it is crucial to consider the interplay between maxims and circumstances as the relevance of a maxim depends on the circumstances of the case.

Referring back to Jonsen and Toulmin’s definition of casuistry, the recent increase in the use of small-scale force seems to resemble a “moral issue.” As, seen from today’s perspective, the use of force short of war seems to lie somewhere between police and military work it seems morally dubious. What is needed, therefore, is a casuistical analysis that considers the general moral principles of just war vis-à-vis the novel circumstances of an increased use of force short of war; a “renegotiation” of *jus ad bellum*. Casuistical analysis leads the way in three particular instances of moral dilemmas, all of which are relevant to small-scale force: “occasions when rules are unclear, when conflicting rules pull us in opposite directions, or when we must ascertain degrees of moral culpability” (Miller 1996, 4). With regard to the first instance, “casuists ask how a general, commonly acknowledged rule is to be interpreted and applied within a particular set of circumstances” (1996, 18). For the policy of targeted killing, questions that need to be answered include who is liable to this sort of lethal action and how, if justified, this action should be carried out. With regard to the second instance, “we are concerned not with interpretative ambiguity, but with the need to settle a conflict between rules that are quite clearly understood. The casuist’s task, then, is not to specify a duty, but to order or rank competing obligations” (1996, 25). One practical consequence for the regulation of targeted

killings that arises from this aspect is the question of whether to allow for a limited use of retributive action which the legalist paradigm forbids and analytical just war thinkers reject. With regard to the third instance, “casuists also seek to determine conditions in which individuals are to be held morally accountable for their behaviour.” In short, casuists “seek to assign blame and merit” (1996, 32). For the assessment of the practice of targeted killing this means that, with regard to determining liability, there will have to be a distinction between the moral culpability of, let’s say, Osama bin Laden as the mastermind of the 9/11 attacks, and, further down the chain of authority, Al Qaeda members without a direct involvement in terrorist plots. Likewise, regarding the decision-making process of the Obama administration, there will have to be a distinction between different degrees of command responsibility.

### **3.7 The Argument for Thomistic Casuistry**

As this thesis’s casuistical analysis derives its moral principles from Thomistic ethics it is situated within the Christian just war generally and Catholic Social Thought specifically. Having said that, this thesis accepts that there might be other Thomistic interpretations of uses of small-scale force. For example, the conclusion of this thesis that a morally justifiable regulation of targeted killings should allow for some limited retributive force will probably be rejected by parts of the Catholic Church, an institution that takes pride in revering St Thomas as one of the Doctors of the Church. Given the method of casuistry this thesis adopts with regard to liability, with its stress on circumstances, the issue of more than one possible reading of Aquinas may be addressed in the words of McKenna (1960, 648): “General rules of conduct can be established readily enough. Circumstances, however, alter cases, in the sense that varying concrete facts bring into convergence varying combinations of principle. In judging cases, then, moralists often disagree sharply on the weights they assign to the

relevant facts. Where this is true, it is more accurate to speak of *a* Catholic view than *the* Catholic view.” In fact, judged from the Catholic point of view, the issues of war and capital punishment are not doctrinal issues for which the Church speaks with a single voice. The then Cardinal Joseph Ratzinger (2004) in his position as prefect for the Congregation of the Doctrine of the Faith illustrated this point as follows:

Not all moral issues have the same moral weight as abortion and euthanasia. For example, if a Catholic were to be at odds with the Holy Father on the application of capital punishment or on the decision to wage war, he would not for that reason be considered unworthy to present himself to receive Holy Communion. While the Church exhorts civil authorities to seek peace, not war, and to exercise discretion and mercy in imposing punishment on criminals, it may still be permissible to take up arms to repel an aggressor or to have recourse to capital punishment. There may be legitimate diversity of opinion even among Catholics about waging war and applying the death penalty, but not however with regard to abortion and euthanasia.

### **3.7.1 Johnson’s Secular Historical Approach**

Beyond the particular conversation in Catholic Social Teaching about the morality of war there is also more than one way of following the historical approach. Having presented that approach mostly through Johnson’s particular interpretation, that take, too, is only one possible reading. This thesis both relies on and parts with Johnson’s just war. The reason for this is that Johnson’s reading of Aquinas is a mostly secular one which does not fully appreciate the theological aspect of Aquinas’s virtue ethic. As Johnson (1984, 6-7) puts it himself: “(...) while certainly debate on morality and war may go on within Christian theological ethics or the ethics of any other religion, debate in the public sphere should be in terms of the values of the larger society.” Consequently, Johnson seems to underestimate the teleological nature of St Thomas’s account of the virtues as inherent in the theological virtue of charity. Some of his critics (see, e.g., McCarthy 2011, 276) go even further than that, criticising Johnson for “his lack of virtue ethics.”

Although the latter critique seems too harsh there can be no doubt that Johnson emphasises the cardinal virtues over the theological ones. While Johnson is

correct that for St Thomas the cardinal virtue of justice was the primary concern of just war he seems to lose that virtue's connection to the highest virtue of charity. More specifically, in Johnson's thinking, McCarthy (2011, 277) detects an "absolutist view of justice, specifying justice in just lethal force, and, in the process, eliminating any moral reservations about the use of lethal force itself." However, while Johnson is correct that for St Thomas justice was the main concern for waging war, human action, for Aquinas, is always subject to the exigencies of the theological virtue of charity, too (see section 3.7.2). Johnson, in contrast, seems to consider the virtue of charity only as proof for his argument that the Christian just war does not start from a "presumption against harm:"

Clearly, Ambrose and Augustine began with the duty of love to protect the innocent, not with a presumption against doing harm, even to an enemy. They reasoned that the duty to protect the innocent permitted use of force against the wrongful attacker up to the level needed to prevent the attack from succeeding, though it must not exceed this level, since the evildoer is himself considered to be someone for whom Christ died. Thus the consideration of restraint in the use of force arises only *after* the duty to use force is recognized, and restraint follows not from a presumption against harm but from the same duty of love directed toward the evildoer. (1996, 28)

By starting from Aquinas's summary of the medieval consensus about the morality of war Johnson employs an understanding which, although it marked the confluence of several secular sources like, for example, Roman law and the code of chivalry, also had a significant transcendental element to it. As a result, because Johnson seeks to provide a secular argument, his reading has at times an uneasy relationship with the transcendental aspect of Aquinas's thinking. For example, his (e.g., 2014) argument on authority emphasises that the classical Thomistic understanding perceived of the sovereign as having been instituted by God, an understanding abandoned after Westphalia when the sovereign was imagined as the representative of the people. In consequence, when Johnson asks what contemporary debate can learn from the medieval consensus he seems to at least implicitly accept the transcendental aspect of statecraft as advocated by Christian thinkers which is



why this thesis can employ Johnson as jumping-off point for the first stage of its moral argument vis-à-vis sovereign authority. At the same time, however, while Johnson (2014, 13-14) emphasises that, for St Thomas, the sovereign as minister of God had to acquire the necessary virtues his subsequent discussion concentrates on the cardinal virtue of justice and seems to de-emphasise the theological virtues. Likewise, his argument about just cause and right intention almost exclusively concentrates on the cardinal virtues.

This thesis seeks to remedy this imperfection of Johnson's historical approach by introducing Thomistic casuistry which is built around a comprehensive account of Aquinas's virtue ethics. Reflecting on the use of small-scale force by employing Aquinas in all of his complexity necessarily requires a thorough engagement with the theological virtue of charity. As far as St Thomas's just war is concerned, connected to the aspect of a sovereign's character formation, virtue ethics seems most relevant with regard to the determinations of just cause and right intention. That is why, as indicated above, this thesis proceeds in two stages. Firstly, it provides a textual analysis of the Thomistic conceptualisation of sovereign authority in conversation with both the revisionist and the Westphalian understanding. Following Johnson's account of the Thomistic understanding of sovereignty this thesis's third chapter demonstrates that revisionists' scepticism toward or even rejection of the authority criterion is unwise and ill-founded. At the same time, the chapter argues that the Westphalian understanding of sovereignty is too restrictive as far as the morally justifiable use of small-scale force is concerned. Secondly, deviating from Johnson's interpretation, this thesis employs Thomistic casuistry.

### **3.7.2 Bolstering Casuistry with Thomistic Virtue Ethics**

Virtue ethics is the name that has been given to the modern revival of Aristotelian ethics, an ethics St Thomas incorporated into his Christian account. "Virtue ethics is a branch of normative ethics that holds the virtues or characteristic habits of

excellence of the soul as its highest value. As a normative approach, virtue ethics advances habits that both identify the person as a moral agent and motivate the individual to become a better human being. In this sense, virtue ethics is unusual in emphasising the character of the decision-maker rather than the rules or theories of moral decision-making” (Calkins 2014, 73).

As touched upon above, virtue ethics is teleological. In other words, it insists that there is a purpose to human life. This purpose, for Aristotle, is to live according to reason which leads to happiness defined as human flourishing. St Thomas, adding the Christian aspect, holds that the human telos is happiness defined as unity with God. In order to achieve this telos, the individual requires the habitual practice of moral and intellectual excellences or virtues. Two types of virtues can be distinguished, moral virtues and intellectual virtues. Moral virtues constitute an excellence of character while intellectual virtues lead to a preference for truth over falsehood. Working in unison, both types of virtue form reason, the key for achieving happiness. In other words, character and perception mutually shape one another (McCarthy 2011, 277). This has direct relevance for casuistry as, as Calkins (2014, 73) notes, the use of virtue ethics leads the casuist toward a conscientious consideration of circumstances. Moreover, virtue ethics can help resolve recent debate about the appropriateness of artificial thought experiments cherished by analytical philosophers which will be considered below. As McCarthy (2011, 296) writes:

It is apparent that the criteria and rules of just war theory neither interpret nor apply themselves. In general, rules need virtues since they alone lack the ability for good moral judgment and for sustaining moral activity. Our character shapes how we see and describe situations, which then determine judgments and decision. Thus, the judgments of what is morally relevant, such as in just cause, and what each criterion consists of, such as sovereign authority, are both shaped by our character.

As a result, it seems that the method of casuistry can be strengthened by the use of virtue ethics. As noted above, carrying out “good” casuistry, to a large extent, depends on how the method is employed by the particular casuist. Casuistry, it seems,

it always subject to the abuses Coates points to. In order to avoid those shortcomings, the use of virtue ethics, arguably, provides the solution. Simply put, if it can be ensured that the casuist acts in accordance with the virtues, she will do “good” casuistry. As Keenan and Shannon (1995, 227) propose, virtue ethics may function as “framework for the morally responsible exercise of right reasoning through the case method.” What this thesis attempts, thus, is, to borrow Calkin’s phrase, a “virtue-imbued” type of casuistry: “The two approaches can combine in such a way that the individual is perfected by means of the practical examples provided by cases. Here, the end(s) of virtue (the telos) is furthered by means of comparisons to previous incidents where judgments were more or less correct. More important to the overall thrust of ethics, the person making the judgment is helped in this way along the road to personal perfection” (Calkins 2014, 161).

Having laid out the basics of virtue ethics, St Thomas’s particular conceptualisation and how it relates to the morality of war will be considered in the following. This section will be kept brief because the details of Aquinas’s virtues ethics and how it relates to small-scale force will be discussed in the chapter on liability to targeted killing. As Gorman (2010b) points out, Aquinas’s three just war criteria of sovereign authority, just cause and right intention constitute the basics of his just war thinking but, in order to fully comprehend the Thomistic just war, one must consider his account of the theological and cardinal virtues as well. Put differently, the virtues constitute the key to St Thomas’s moral philosophy.

Like any human action, the use of force, too, must be duly ordered by the virtues in order to be good (2010b, 17). In other words, human beings can reach their telos only if they freely choose to lead a life that is in accordance with the virtues (2010b, 24). For St Thomas, “genuine moral action can only proceed from a harmoniously ordered soul in which reason, will, and desire are united in pursuit of the good” (2010b, 39). If this is the case, one’s desires and actions will automatically advance the common good. Following from that, in cases where war is the result of

the “rightly-ordered desire to do good” it must be considered virtuous (2010b, 40). That, in fact, is why his treatment of the just war is placed in the *Secunda-secundae* of the *Summa Theologiae*, the section known as the “treatise on the virtues.” This section of the *Summa* investigates the theological (faith, hope, charity) and cardinal virtues (prudence, justice, fortitude, temperance) all of which are necessary to achieve the *telos* of one’s life. The most basic distinction between the cardinal and theological virtues is that the former category provides the necessary foundation for earthly human action while the latter orients man to his supernatural end of beatitude. Happiness, for Aquinas, is two-fold. The cardinal virtues constitute the part that is accessible to human beings according to natural principles while supernatural happiness or beatitude can be obtained only with God’s assistance. In consequence, the theological virtues “transcend” the cardinal virtues because they lead human beings to their final end which is union with God. In Aquinas’s account, both types of virtues are not at odds with each other. Rather, the theological virtues perfect the cardinal virtues.

Aquinas by no means diminishes the importance of the natural virtues for leading a decent, well-ordered, and happy life, but he does suggest that even the most virtuous person cannot, by his or her own power, obtain supernatural happiness. (...) Any conception of morality which does not recognize God as both the origin and end of all human acts is necessarily incomplete. Modern attempts to secularize just war theory by basing it strictly on humanitarian principles or values that have no reference to God are, from a Thomistic perspective, misguided attempts to comprehend human morality, since they lack the necessary lodestar for making moral judgments. (2010b, 61)

### **3.7.3 Virtue Ethics and Thought Experiments**

Debate about the usefulness of thought experiments dates back further than the recent disagreement between Walzer and his critics. For example, Shue (1978) put forward a general scepticism towards the use of artificial cases in ethical reasoning. Although this thesis shares most of Shue’s concerns, it does not deny the usefulness of this method *per se*. Thaler’s (2016) distinction between productive and

unproductive hypotheticals seems to be a helpful one in this regard. After all, critics of this thesis might argue that Hersh's (2016) "unofficial" account of the bin Laden raid (see 5.5.2), which this thesis uses for moral reflection, constitutes a thought experiment, too. Nevertheless, even if the raid did not happen as Hersh claims, the scenario appears to be sufficiently realistic to consider it a productive thought experiment. That is why this thesis can employ it in its casuistical analysis as if it in fact had taken place without having to take a stand in the debate about its accuracy.

However, when ethical debate resorts to unreal thought experiments such as the following on "justified self-defensive rape" taken from Steinhoff (2013, 149) it seems reasonable to argue that these cannot advance moral argument.

Innocent Jenny, naked in her bedroom, is attacked by Serial Killer, who has broken in. He too is naked. Jenny, who is a doctor, is currently treating her vaginal infection with a potent new ointment, which has the side-effect of killing any man whose penis is exposed to it long and severely enough, something best achieved by sexual intercourse. While the killer is trying to strangle her, they are wrestling on the ground, she gets on top of him, and he gets his hands on her throat and squeezes. In her desperation, she shoves the aggressor's penis – while the aggressor explicitly says "No" – into her vagina and starts to move up and down while the man still strangles her. But suddenly the ointment works, the man goes into shock and dies. Jenny is safe.

Unproductive thought experiments have already featured in the debate about *jus ad vim*. When Frowe (2016) criticises the concept for being redundant based on thought experiments that are highly unlikely to occur in the real world, there seems to be little appreciation of the moral dilemmas decision-makers face in war. In addition, Frowe's way of reasoning employs the just war as a "moral slide-rule" in order to gain a water-proof reading of the justice of and in war. However, as Thaler (2014, 531) points out, despite the need for rules and principles whose observance can be checked, far-fetched analytical construction lacks practical relevance. Consider the thought experiment Frowe (2016, 121) employs in her article:

*Grenade:*

Bully wants to painfully pinch Victim's arm. Victim can dissuade him from doing so by throwing a small object at Bully that will slightly wind him. However, the only small

object Victim has is a grenade. When the grenade deflects off Bully, it will detonate next to innocent Friend, killing her.

*Provoke:*

Bully wants to painfully pinch Victim's arm. Victim knows that if he resists, Bully will become so enraged that he will kill innocent Friend.

Frowe's example seems so distant from the reality of war that it cannot offer practical guidance for decision-makers who have to decide about, let's say, whether or not the bin Laden raid should be carried out. Therefore, this thesis investigates cases that actually took place or, as in the unofficial account of the bin Laden raid, are very realistic, despite the oftentimes messy circumstances that surround them. Unproductive thought experiments run counter to this purpose and have no place in this thesis. As Thaler (2014, 531) succinctly summarises: "An excessive stress on analytical construction, as it is prevalent in some circles of moral philosophy, distracts us from the task of appraising the various factors that need to be accounted for if Just War theory is to play a role in critically evaluating warfare. Neglecting this task is a mistake."

It should be emphasised that traditional casuistry by no means rules out the use of thought experiments per se. In fact, thought experiments have been used by casuists for many centuries. For example, the penitentials of the Middle Ages, one of the cornerstones of the development of casuistry, at times, relied on fictitious cases to lead the deliberation process of the confessor (Jonsen 2005, 56). Even more importantly for this thesis, St Thomas (ST, II-II, q. 96, a. 6) himself employed thought experiments in his reasoning:

If a case arises wherein the observance of a law would be hurtful to the general welfare, it should not be observed. For instance, suppose that in a besieged city it be an established law that the gates of the city are to be kept closed. This is good for public welfare as a general rule, but if it were to happen that the enemy are in pursuit of certain citizens who are defenders of the city, it would be a great loss if the gates were not opened to them. And so in that case the gates ought to be opened, contrary to the

letter of the law, in order to maintain the common good, which the lawgiver had in view.

Given the tension between productive and unproductive thought experiments the question arises how to determine when a particular thought experiment does not advance moral debate. Interestingly, the key to this determination can be found in the employment of virtue ethics, in particular in the virtue of prudence. The classical understanding of *prudentia* entails much more than the idea of mere caution associated with prudence in much of today's reasoning. For Aquinas (ST, II-II, q. 47, a. 2), prudence was "right reason applied to action." Prudence perfects the rational capacity to choose actions that will lead to genuine flourishing, it combines the intellectual perception of speculative principles with the practical knowledge of particular circumstances (Gorman 2010b, 70).

Thus, in cases where the use of thought experiments seems doubtful, if no practical knowledge can be derived from them, the prudent casuist will abandon them. It is to be expected that advocates of unproductive thought experiments will object by making an argument along the lines that virtue ethics generally is subjective and thus liable to abuse. Admittedly, a healthy scepticism toward virtue ethics and its internal character is understandable. The suggestion of a prudential determination about the usefulness of thought experiments should thus be understood as a call for a middle ground between Walzer's seemingly outright rejection of such ways of reasoning and the use of entirely unrealistic thought experiments.

### **3.8 Addressing the Downsides of the Historical**

#### **Approach**

It seems fair to say that historical approaches have somewhat fallen out of favour in contemporary moral debate (O'Driscoll 2013, 47). O'Driscoll (2013, 53) provides a fairly comprehensive list of criticisms against the historical approach:

The historical approach is vulnerable to four primary lines of critique. The first is the notion that a reliance on history is indicative of a conservative approach, one that is unduly impressed by established authorities and familiar ideas. The second is the related concern that deference to the historical record will perpetuate or at least encourage, rather than treat or transcend, humanity's propensity to regard military force as a solution to practical problems. The third is the refrain that the study of the remote past is an ivory tower pursuit that has little connection to the real world. The fourth critique relates not to the integrity of the approach per se, but to certain tendencies evident in the manner by which its proponents have applied it.

With the first line of criticism, O'Driscoll has in mind the traditional moralist's problematic resort to "the wisdom of a preselected canon of great texts" (2013, 53). An overreliance on one particular author or a particular train of thought might come with the taste of "subservience to the experience of the past" (2013, 53) as the authority of these authors might merely be the result of their work having been influential over the centuries. As if O'Driscoll were specifically pointing to a Thomistic reading of the just war he writes: "For instance, why hark all the way back to Thomas Aquinas, or some other such long-dead figure, we might ask, when looking for an answer to a contemporary problem, such as how to think about the ethics of drone warfare?" (2013, 54). Such argument, critics will object, does not constitute progress. Rather, it only reproduces the thought of past thinkers (2013, 54). In an earlier draft of his article, O'Driscoll (2011, 17) referred to Reichberg's (2004) article titled "Preemptive War: What Would Aquinas Say?", written in response to the controversy about the 2003 Iraq war, whose title, although not necessarily its content, suggests that the essay does merely look at pre-emptive war through the eyes of one prestigious past thinker.

The second line of critique is closely connected to the first. Through her reliance on past thinkers, the traditional moralist is unable to overcome the use of force as a legitimate tool of statecraft. "The operative idea appears to be that, rather than taking our problems on their own terms and thinking through them for ourselves, we should adopt a more deferential approach, and yield to the instruction



of our illustrious predecessors. The problem here, of course, is that these illustrious predecessors are the same tragic figures that Immanuel Kant denigrated as ‘sorry comforters’ who enabled rather than restrained the brutality of war” (2013, 55). An example for this line of critique might be taken from Johnson’s (see, e.g., 1996, 30-33) work. As he takes the medieval consensus of just war as his moral baseline, he has criticised the US Catholic Bishops for their attitude towards the use of force which Johnson identifies as “presumption against war.” Johnson argues that the classical just war started from a “presumption against injustice” instead and was thus more permissive vis-à-vis the use of force. The intellectual father of the bishops’ pastoral letter, J. Bryan Hehir (2000, 32-33) agrees with Johnson that the bishops deviate from classical just war teaching. However, he considers this a welcome development indicative of human progress toward the use of force. Analytical philosophers, due to their scepticism regarding the use of history, do not face this problem (O’Driscoll 2013, 56).

The third line of criticism holds that focusing on the argument of particular past thinkers prevents the moralist from giving contemporary moral issues their due attention. “For example, if one is busy researching the intricacies of Grotius’s *Rights of War and Peace*, one is precluded from doing other, presumably more useful things, such as contributing to debates about how to respond to the tumult of the Arab Spring and North Korean saber-rattling. Constantin Fasolt puts it beautifully when he writes that history ‘teaches human beings in a school whose doors are shut. (...) Outside the world is surging. Inside, history demands attention’” (2013, 56). The example O’Driscoll provides for this shortcoming is a debate between Elshtain and critics of her book *Just War Against Terror* which, according to O’Driscoll (2013, 57), “ultimately came to resemble a narrow examination of the finer points of Book 19 of Augustine’s *City of God*.” Such a “narrowly historical approach,” for O’Driscoll, is indicative of the approach’s “tendency toward scholastic navel-gazing.”

The final line of critique O'Driscoll lists is the tendency that the historical approach tends to portray the history of just war reasoning as "a single developmental narrative" which is presented as the one and only narrative (2013, 57). In essence, this narrative amounts to Johnson's influential history of just war. In addition, this narrative is then presented as the sole point of entry for those trying to ethically assess the conundrums of war (2013, 58). "These scholars, captured by their own myths, and forgetful of the act of abridgement that they have effected, have then gone on to seal off the tradition they have just created by arguing where its boundaries properly lie and what historical thinkers fall within and beyond them. The result is the claustrophobic narrative just described" (2013, 58). The result of this phenomenon is that the historical approach to just war is conservative in nature. The field only "repeats and reproduces itself at the expense of fresh thinking" (2013, 58), a critique the revisionist just war camp will readily accept.

In response, O'Driscoll (2013, 59-61) provides a "qualified defense of the historical approach" which can be supplemented by some aspects specific to the Thomistic just war. Starting with the first line of critique, O'Driscoll (2013, 59) notes that the historical approach does not necessarily have to be conservative. Referring to historian Richard Evans, O'Driscoll notes that history does not have to function as a refuge from contemporary conundrums. Quite the contrary, "the main purpose of the modern historian is not to seek familiarity in the strange, but to uncover the strange in the familiar." Furthermore, as O'Driscoll (2013, 60) goes on to argue, the historical approach does not always defend established authority. Rather, history can also be used to challenge established authority by questioning some of its precepts which may today be considered as fixed, but had not at all been fixed in the past. The historical approach, quite the contrary to being conservative, can actually "be invoked in the service of rupture and revolution," considering issues "with fresh eyes." This thesis is built around this defence. It concludes that the contemporary state of just war thinking with its limitation of just cause to defensive uses of force is too restrictive

when it comes to the issue of the just employment of small-scale force. Seen from a Thomistic angle, sovereign authorities, under certain circumstances and in a duly restrained manner, may morally resort to retributive uses of force, too. The use of history is thus anything but conservative here. Quite the contrary, given the contemporary, seemingly unassailable, consensus to only allow defensive force the plea for limited retribution might seem “revolutionary.”

Regarding the second argument, O’Driscoll (2013, 60) points out that looking at contemporary issues through the eyes of a particular past thinker does not have to be “an act of deference to those who have gone before us” which affirms that humankind will never be able to abandon the use of violence. The thought of previous thinkers can function as a springboard from which to start the evaluation of contemporary questions. The issue one faces here is the essential question of how a particular moralist regards human nature and the nature of moral action as it relates to just war reasoning. The idea of human progress that inevitably leads toward peace on earth which arguably underlies this line of critique is commonly associated with Kantian idealism. This idea markedly contrasts with the philosophical outlook of a Hobbesian pessimism which essentially regards human beings as naturally self-interested and unable to overcome violence individually. On a spectrum that has Kantian idealism and Hobbesian pessimism as its outer limitations, Gorman (2010b, 298-299) suggests St Thomas’s account of “classical Christian realism” as middle ground approach:

(...) Aquinas offers a realistic portrait of human affairs that recognizes the perils of human vice and sinfulness, while at the same time acknowledging that virtuous human action can have a positive impact in our fallen world. Aquinas’s outlook on the human condition perhaps can best be described as classical Christian realism, since it is grounded in a rational understanding of reality and elevated by the revealed truths of the Christian faith. (...) For St. Thomas, human beings are not completely depraved and self-interested by nature, nor are we innately good and inclined to peace and progress. Rather, in Aquinas’s view, our natural inclinations need to be ordered by reason and sustained by grace, or else we are likely to fall into error and sin.

Aquinas's view of human nature has important individual and social implications. At the level of the individual, he teaches that real human flourishing does not come about unless a person chooses to follow the commands of reason and to act virtuously. On a larger scale, Aquinas's understanding of human nature indicates that progress toward a more peaceful and stable international order is possible if world leaders act virtuously with an eye to the common good, but such progress certainly is not inevitable, and given human's propensity to violence and sin it appears that the possibility of creating an ideal world order is highly improbable, if not delusional.

Thus, taking a Thomistic approach as point of departure, this thesis does not deny the possibility of human progress vis-à-vis the use of force while emphasising that the use of violence remains a necessary tool of maintaining and (re)establishing a *tranquillitas ordinis*.

The third line of critique which assumes that the remote study of the past cannot provide practical guidance is, to some extent, a misunderstanding of what the historical tradition is supposed to do (O'Driscoll 2013, 60-61). Relying on John Tosh for this point, O'Driscoll argues that history can in fact be taken as "a set of counter-images" instead of a mere mirror. Consequently, the traditional moralist can find in history a different point of view that "enables us to look at our own circumstances with sharper vision." This thesis's Thomistic approach can withstand this kind of critique as it is not at all a project of "scholastic navel gazing." Rather, it reflects upon the contemporary moral problem of the expanding use of small-scale force by taking Aquinas's ideas not as a mirror, but as "a set of counter-images" which provides practical guidance for the regulation of targeted killings.

The fourth line of critique, for O'Driscoll (2013, 61), is more difficult to address as it does not relate to the historical approach per se, but to how this approach has been employed by just war thinkers. Through reducing the just war tradition to a single narrative that is portrayed as the one and only starting point of analysis the field has been unnecessarily restricted. O'Driscoll, in his own work (see, e.g., 2018), seeks to remedy this shortcoming by going beyond the established Christian starting point of the tradition, extending it to a "systematic treatment of Greco-Roman ideas

of just war” (2013, 62). While O’Driscoll is correct in pointing out that the first just war thought predates the Christian just war, however, this does not mean that a particular Christian interpretation cannot incorporate precepts of non-Christian pedigree. In fact, the Thomistic just war does not fall into this trap as it combines the best of both worlds. St Thomas’s just war is unique in the sense that while it rests on the Christian tradition it, at the same time, relies on an Aristotelian foundation. As a result, the Thomistic account of small-scale force, while firmly Christian in outlook, is not narrowly focused on the reduced narrative O’Driscoll laments but actually reaches out to the classical world.

### **3.9 Addressing the Applicability of Aquinas and Probabilism**

Like any method, casuistry has been criticised for its methodological shortcomings. In the following, two particular objections will be considered. To begin with, giving St Thomas a prominent role in this thesis’s casuistical analysis inevitably leads to an ostensible contradiction. As Jonsen and Toulmin (1988, 369) note, Aquinas was a systematic theologian, not a casuist in the style outlined above. In particular, Aquinas’s treatment of the just war was not written as “an isolated piece of casuistry” (Reichberg 2017, 14-15):

St. Thomas, by contrast, took care to situate his “*Quaestio de bello*” within a systematic treatment of the virtues. Hence, far from proposing a free-standing decision procedure by which to judge particular cases, his aim was rather to situate lethal force in relation to the virtues that alone can make it an acceptable practice in human life, and inversely, to indicate in this connection what vices are especially to be avoided. The idea, in other words, was to examine what moral dispositions ought to be cultivated by persons engaged in war. Enfolding casuistry within a typology of the virtues represented Aquinas’s attempt at merging the legal teaching of his day (chiefly canon law but with elements from civil law as well) with the virtue perspective of Plato and Aristotle – duly transformed to fit the exigencies of the Christian message.

Is it not, then, that St Thomas's basis in systematic theology conflicts with casuistry's idea of being led by the cases? No, quite the contrary, as Jonsen and Toulmin note (1988, 123), not only did St Thomas in fact reason casuistically at times, his thinking is also inherently connected to the development of casuistry through concepts like "natural law," "natural reason," "conscience," "prudence," and "circumstance," all of which were key elements of his thinking. Shytov (2001, 77) even goes as far as to point to Aquinas as having made the most important contribution to the development of high casuistry. In fact, St Thomas's "disputed question" method, while arguably not as sophisticated, like casuistry, tried to balance general principles and particular circumstances. Indeed the very school of international ethics associated with St Thomas, that of natural law, is built around the idea that general moral principles must be interpreted in light of circumstances. While the precepts of natural law are self-evident, the question how to apply them in a concrete situation is debatable (2001, 45). And the conclusions of such debate, as Boyle (1992, 115) points out, "depend not only on moral principles and conceptual analysis but also on empirical judgments and interpretations that are not simply a function of one's basic normative outlook." In addition, it should be noted that while this thesis's argument for Thomistic casuistry is its original contribution as far as method is concerned it does also, in the chapter on sovereign authority, employ Aquinas in a more conventional analysis rooted in close and careful textual assessment and logic. In a sense, the argument of this thesis, working in two stages, can thus be perceived as a testament to the richness of St Thomas's thinking which can be employed in more than one way.

Furthermore, integrating Aquinas's virtue ethics into the casuistical method can help address the objection that caused casuistry's historical disrepute. Casuistry's fall from grace was mainly caused by the doctrine of moral probabilism. The Dominican Bartolomeo Medina defined this doctrine as follows: "It seems to me that, if an opinion is probable, it is licit to follow it, even though the opposite opinion is

more probable” (as cited in Jonsen and Toulmin 1988, 164). In other words, probabilists held that a “reasonable doubt as to a law’s validity is sufficient to discredit its claim” (Smith 1999, xxv). As a practical consequence, casuistry in the light of probabilism led to verdicts which, for its critics, were entirely arbitrary. The most influential of casuistry’s critics was Blaise Pascal who, in his satirical *Les Lettres Provinciales*, mocked the distortions of casuistry through the doctrine of probabilism. It seemed that casuistry delivered a “lax treatment” of sinners and thus had lost its capacity to render morally just judgements: “King Louis XIV, it was said, would abjure his mistress on Holy Thursday, confess to his Jesuit confessor on Good Friday, take Communion on Easter Sunday, and bring back his mistress on Easter Monday” (Jonsen and Toulmin 1988, 233).

The modern casuist Kenneth E. Kirk acknowledged the problem that casuistry can, if carried out light-heartedly, result in mere situation ethics. However, as Smith (1999, xxv) explains, Kirk stressed that probabilism is not necessarily a bad practice. Rather, if “doubt about the right thing to do” is “real” in a given situation, the issue should be accepted as an issue of doubt. Kirk (1999, 269-270) developed two main safeguards against probabilism. The first is to require that the doubt must be “genuine,” “not a passing fancy or prejudice.” Kirk required at least one “probable opinion against the law in cases where it is proposed to wave it” “based on some fact or argument whose force even conscientious consideration cannot weaken.” In other words, the question whether or not to allow probabilism depends on the seriousness of the doubt. This takes the discussion back to the argument made above that a casuist needs to be virtuous. For Kirk, “To perform the task of casuistry well, the casuist must be someone of good character, the kind of person who will recognize a moral claim for what it is” (Smith 1999, xxix). What shines through here is the educational aspect of casuistry which aims at developing the conscience of members of society (Shytov 2001, 79). In addition, even if the casuist reasonably concludes that the rules need to be changed in a given case based on probabilistic grounds she is still bound by general

moral principles. Secondly, Kirk points out that in 1679 following a merely probable course had been limited by Pope Innocent XI to cases in which no vital interest was at stake. This limitation, Kirk (1999, 387) noted, had been accepted by most casuists but Pascal decided to ignore this change in casuistical practice.

Thus, being aware of the danger of falling into the probabilistic trap, this thesis can go ahead with its casuistical analysis of cases featuring the use of force short of war. In cases where the verdict argues for a change of rules the argument will have to be founded on serious moral doubts, not mere “fancies” as Kirk called the probabilistic musings of casuists who fell into the probabilistic trap. In order to do this, special emphasis will be given to the virtue of prudence which, if employed correctly, cautions against an embrace of the most opportune solution available at the moment.

## **Conclusion: E Pluribus Unum – The Diversity of Just War Tradition**

Having distinguished between three pathways to just war, one might ask whether there is still reason to treat them, despite their fundamental disagreements, as belonging to one tradition. As O’Driscoll (2008a, 91-92) summarises the core of the debate about the existence of a singular tradition, “(...) a review of the literature on the just war tradition reveals many diverse views on which assumptions, conditions, and commitments are key to, and definitive of, this tradition. Where one account of the just war tradition privileges a particular normative orientation as the *sine qua non* of the tradition, others will stress a certain historical origin as key, or a given chain of transmission as essential.” In consequence, some authors (see, e.g., Walker 1993, 106), given the diversity of just war thinking, seem to reject the notion of a just war tradition. For them, it seems, the differences in the various approaches to just war are so great that one cannot refer to them as belonging to a singular tradition.



However, Coates (2016, 5) notes that traditions of thought are never univocal as a tradition that speaks with one voice ceases to be a tradition. Put differently, it is necessary for a tradition to pronounce differences within a shared identity. In fact, as O'Driscoll (2008a, 109) argues, regarding the just war there seem to be enough commonalities between different approaches that classifying them as belonging to one tradition is justified; in his words: "many just war theories, one just war tradition." This common ground, he (2008a, 115) argues, is built around the existence of "a common moral vocabulary and mode of reasoning, historically associated with the idea of just war, and an interpretive community engaged in arguing about how best to make sense of it." Johnson (1995, 148) provides an image that helps grasp the idea of a single just war tradition:

(...) my own position is that we should speak of just war tradition, not simply one doctrine or another, understanding the tradition to include a number of related streams of thought that are reflected in the diversity of perspectives found in current just war debate. (...) I like to describe just war tradition as a whole by the metaphor of a river flowing through its delta toward the sea. The common stream forms, separates, and forms again, with the main flow now being carried by this channel, now by that one. When all its parts are understood together, just war tradition represents a cultural consensus on when war is justified and what limits should be observed in fighting justly.

Johnson (1984, 1) argues that the just war tradition constitutes a consensual tradition in Western culture about the permissibility and restraint of war. Being of Christian origin, the tradition became secularised in the centuries that followed. In other words, the tradition's Christian values stopped to exist as specifically Christian ones, being understood today as general part of Western culture (1984, 5). He (1995, 149) identifies several particular streams of thought that combined in a cultural consensus, best summarised by Aquinas, about the justification of war: theology, philosophy, chivalric custom and military practice, canon and civil law, and precedents that governed the relations between princes. The consensus, however, he goes on to argue, broke down under the conditions of modernity and the various streams that had

combined in the consensus started to become increasingly distinct again. In particular, the legal stream became the dominant one while, for example, the theological stream fell dormant until the twentieth century (2013a, 25). For contemporary just war debate Johnson (1995, 149) identifies four particular streams that together form the “broader just war tradition:” “In the military sphere, manuals of warfare prescribe acceptable conduct in battle and stipulate rules of engagement for specific conflicts. In the legal arena, the corpus of international law guides the relations of States. In the theological domain, theorists like Paul Ramsey and the authors of the 1983 pastoral letter of the American Catholic bishops pronounce on war conduct. And in the academy, philosophers like Michael Walzer and Elizabeth Anscombe reflect on the relevance of the tradition to current challenges.”

Writing in 1995, Johnson could not foresee the emergence of the revisionist just war and its unique approach. Revisiting Johnson’s distinction between the four particular streams of the “broader just war tradition” it seems that the academic stream has split further into the two rivers of Walzerianism and revisionism. While these two streams have serious disagreements about method and substance they both share the just war’s core of the “dual theme” (Johnson 1984, 2) of permission and restraint. In consequence, both camps have a place within the broader just war tradition. One of the objectives of this thesis is that, while concluding that a methodological reconciliation between the two camps seems impossible, there is no reason why there should be no exchange about substantive issues. Furthermore, this thesis demonstrates that substantive just war questions can be illuminated in a valuable and distinctive way via traditional casuistry. The recapture of casuistry is thus both about showing that what lies between the Walzerian and revisionist approaches is not some barren wasteland, but a rich and productive field to which they can and should both contribute, but which is also effectively tilled with a distinctive set of tools supplied by the casuistical method.

# 4 Sovereign Authority and Small-Scale Force

## Introduction

Until recently, just war thinkers of various schools more or less unanimously argued that the authority criterion of just war had been neglected in contemporary debate. Today, however, it seems that the question of authority has moved to the forefront of debate as a host of publications indicates (see, e.g., Benbaji 2018; Brown 2011; Fabre 2008, 2012; Finlay 2010; Heinze and Steele 2009; Kutz 2005; Lang 2009; Parry 2015, 2017; Reitberger 2013; Schwenkenbecher 2013; Steinhoff 2007; Williams 2013; Wrangle 2017; Zehr 2013).

The reason for this revival is directly linked to the debate between Walzerians and revisionists. While the former camp, starting from a Westphalian legalist perspective, argues that it is the state that is ethically privileged, most revisionists deny this perspective, considering the individual as the crucial unit of moral analysis. Nevertheless, when it comes to the assessment of inter-state conduct, the revisionist just war commonly “deploys a generally conventional account of sovereign authority, indebted to a stereotypical Westphalian position” (Williams 2013, 65). This Westphalian position holds that states have a right to political sovereignty and territorial integrity and limits the justified use of force to self-defence. Both Walzerians and revisionists thus, at the same time, cherish an understanding of authority which is markedly different from the classical, pre-Westphalian understanding of sovereign authority which neither supported the two foundational Westphalian principles nor the limitation of legitimate force to self-defence. This chapter argues that there is a moral gain in recovering parts of the classical understanding of the authority criterion for the policy of targeted killing of culpable unjust terrorist threats.

Within the ethics of war at least five terms have historically been employed to refer to the authority criterion which arguably caused confusion, namely legitimate authority, proper authority, right authority, competent authority, and sovereign authority (Reitberger 2013, 67). This chapter refers to the authority criterion by using Johnson's term of "sovereign authority." The merit of this term is that it binds together two crucial parts needed to come to terms with matters of authority vis-à-vis questions of war and peace. As Philpott (1995, 354-355) notes:

Precisely because of its complex historical evolution, finding a definition encompassing every usage since the 13<sup>th</sup> century is a pipe dream. However, there is a broad concept – not a definition, but a wide philosophical category – which unites most of sovereignty's past, and with which we can begin: authority. Authority is "the right to command and correlatively, the right to be obeyed." It is legitimate when it is rooted in law, tradition, consent or divine command, and when those living under it generally endorse this notion. Legitimate authority is crucially different from power, which is raw, pure, physical and direct. (...) Even at its most monarchical and dictatorial, even in the case of the absolute law-giving monarch of Jean Bodin or Thomas Hobbes, sovereignty is conferred by some notion of right which provides a basis for assent other than coercion.

Narrowing down the understanding of sovereignty this way does not, however, constitute an attempt to provide a comprehensive account of authority within the just war tradition. Making such an attempt in one single chapter would indeed be an illusionary task. This chapter concentrates on the major fault line hinted at above and assesses what can be learned from this debate with regard to targeted killings.

In terms of outline, the chapter begins with A. J. Coates's argument with regard to what he refers to as "legitimate authority." Coates is one of very few contemporary just war thinkers who defend a classical reading of the authority criterion. Unsurprisingly, Coates has been subject to various critical appreciations. One particularly succinct case of such critique, Uwe Steinhoff's rebuttal, will therefore be summarised next. In what follows, Steinhoff's rather narrow revisionist critique of Coates is put on a broader foundation by considering Cécile Fabre's cosmopolitan account of authority.

After having provided this overview about contemporary just war debate the chapter turns to the classical just war as represented in the work of St Thomas. Firstly, the philosophical foundation of his work on politics and just war will be explored. Once this foundation has been established the chapter turns to the pre-Westphalian conceptualisation of sovereign authority and contrasts this understanding with the modern understanding. After having appreciated the differences between these two conceptualisations the chapter will be in the position to consider the critique Steinhoff and his analytical colleagues have put forward against Coates specifically and against the classical just war generally. As it turns out, the origin of their disagreement goes back to their different units of analysis. Finally, the chapter provides the first stage of the thesis's argument with regard to the regulation of targeted killings, arguing, based on careful textual assessment and logic, that a partial recovery of the classical understanding of sovereign authority is the most ethical way of regulating small-scale uses of force.

## **4.1 The Authority Criterion in Contemporary Just War Debate**

### **4.1.1 A. J. Coates's Defence of "Legitimate Authority"**

Coates (2016, 139) starts his argument with the notion that the criterion of "legitimate authority" has been neglected in recent just war debate. Reflecting on the issue of terrorism, Coates argues that instead of focusing on the crucial question of the authority to use force, contemporary thinkers have instead wrongly concentrated on the issue of non-combatant immunity. In essence, Coates's argument is that the distinction between combatants and non-combatants is one that only applies during war which he considers to be a conflict between two or more legitimate authorities. As terrorists are no public authority and thus no legitimate one they are unable to wage war and the question of non-combatant immunity is thus irrelevant in the

confrontation with terrorism. Simply put, for Coates, terrorist acts are crimes, their killing murder and by no means acts of war. As a result, he (2016, 140) objects to the moral intuition that terrorist attacks on police officers are less despicable than assaults on civilians:

In normal circumstances a reverse reaction is discernible, the murder of policemen provoking greater not less moral outrage than the deaths of ordinary civilians (hence, perhaps, the retention in the United Kingdom of capital punishment for the murder of policemen long after its abolition for the murder of ordinary members of the public). Only if we are prepared to concede that the terrorist has belligerent status and that the soldier or police officer has lost his or her immunity from attack by virtue of acting in a state of war is the uneven reaction to the deaths of soldiers and civilians justified.

Coates holds that the authority criterion is the single most important and “logically prior principle” in the moral assessment of terrorism. In the discussion of the authority criterion that follows, Coates recalls the “much more morally demanding principle” (2016, 142) of authority as advocated in classical just war thought. Elaborating on St Thomas in particular, Coates compares and contrasts the classical understanding of authority with “the narrowly legalistic interpretation of legitimate authority” (2016, 140) he identifies as the main source of the criterion’s contemporary neglect. The following presentation of Coates’s argument concentrates on his substantive argument, for the moment leaving aside his references to Aquinas as the Angelic Doctor’s take on authority will be considered in a separate section.

Building on the classical understanding, Coates (2016, 140-141) points out that the just war tradition sought to maintain and establish peace by emphasising the authority criterion. One way of doing this was to limit the recourse to arms to those in authority defined as those who had the responsibility to ensure the common good of the political community. In other words, only public employments of force were deemed to be justifiable while private uses of force beyond self-defence were considered illicit *per se*. Importantly, Coates detects a parallel between medieval times when just war thinking was first systematised and today’s terrorist threat which, in his opinion, calls for a reappraisal of the classical take. As Coates points out, the

medieval rationale behind the stress of public authority was to rein in the abundant private use of force by multiple actors at the time. Given today's terrorist threat as well as what he calls "the proliferation of self-constituted revolutionary movements" (2016, 141), Coates finds considerable moral value in the idea of denying the justifiability of private uses of force from the start. In his own words (2016, 141): "To insist on the public monopoly of the use of force remains a fundamental step in any process of pacification, and securing that monopoly is a precondition of civilized society."

While emphasising the public nature of the use of force Coates, at the same time, detects an abuse in how this idea evolved which in turn contributed to the recent neglect of the authority criterion. He (2016, 141) laments that the criterion has been employed in "merely utilitarian or pragmatic terms," meaning that the criterion has come to be understood in terms of the Westphalian concept of state sovereignty. In the discussion that follows, Coates (2016, 142-143) points out how the classical understanding of authority understood as responsibility for the common good applied both internally within a ruler's own political community but also entailed a responsibility for the common good of all political communities. The authority criterion was thus much more demanding and irreconcilable with the Westphalian idea of the inviolability of state borders. Coates (2016, 141) concludes that the authority criterion "(...) has become a most undemanding and largely formal principle, which invests any state whose government is in effective control of its territory with the right to war. War-making, or the *competence de guerre*, is seen simply as a formal requirement or accompaniment of state sovereignty." The problem that follows, for Coates, is that due to the fact that the authority to wage war has been taken for granted with regard to the modern state the criterion has fallen dormant to such an extent that it is not properly engaged vis-à-vis today's non-state threats. As a result of the stress of the formal nature of authority, the criterion's demands have been reduced and a greater permissiveness in the use of force can be detected (2016, 142).

Importantly, while stressing what he sees as obvious benefits of the authority criterion, Coates does not deny that authority can be abused. If one were to uphold an overly strict reading of the authority criterion, Coates (2016, 144) acknowledges, the denial of any use of force to non-state actors can be morally problematic if it is used in order to justify “all *de facto* government and leads to political quietism.” However, Coates is quick to stress that the classical just war tradition did not advocate such repression. “A much more radical understanding of the principle is possible, and it is one that seems to be required by the just war tradition, given that the *vis coactiva* and the right to war are vested in the state as a political community and that powers are entrusted to rulers or governments as agents of that community. If that is so, the private appropriation of power by the government of a state undermines its legitimacy and establishes, at least in principle, the right of resistance” (2016, 144-145). The essence of Coates’s (2016, 145-147) following discussion of the right of resistance is that while the just war tradition does not deny the justifiability of resistance against established authority it approaches the issue with some considerable caution, emphasising prudential concerns. This interpretation, in Coates’s eyes, contrasts markedly with today’s bias in favour of resistance and revolution which he detects in both the theoretical debate and international affairs.

Furthermore, in cases where the right of resistance is employed to justify revolutionary warfare, Coates points to a non-consistent employment of other just war principles. Coates criticises that contemporary just war thinking seems to relax moral criteria for revolutionary agents while fully holding state agents to account. He (2016, 147-149) demonstrates his argument in a discussion of the principle of non-combatant immunity as it has been presented in recent thinking about revolutionary warfare. Due to sympathy with the weak side, namely the insurgents, Coates accuses the “apologists of revolutionary war” (2016, 147) of sacrificing otherwise sacrosanct just war principles. Coates warns against such an interpretation because revolutionary warfare, due to its specific nature, seems hard to restrain: “Modern revolutionary



warfare is countervalue warfare in its purest form, a war directed against an entire society with all its attendant institutions (that is, instruments of repression and control). The likelihood of its remaining limited, therefore, is always remote, and its tendency to become total wellnigh irresistible” (2016, 149).

With regard to the importance of the authority criterion understood as responsibility for the common good, Coates (2016, 150) allocates particular importance to the criterion with regard to revolutionary war. Unfortunately, in his opinion, contemporary thinkers have de-emphasised or even abandoned the criterion in favour of the determination of just cause. The problem he sees in this development is that the criterion of legitimate authority is effectively muted, taking on “a form of *self*-authorization” (2016, 156). The possible result, in Coates’s eyes, is a situation of anarchy vis-à-vis the use of force where any agent may opt to use force, a situation not unlike the one in the Middle Ages described above which led to the development of the authority criterion in the first place.

Crucially, Coates has not only been criticised for the position he adopts, but in fact his warning against self-authorisation has been at the very core of the cosmopolitan/revisionist argument in favour of abandoning the authority criterion entirely. It is to this school of just war the discussion turns to now.

## **4.2 The Cosmopolitan/Revisionist Idea of Authority**

Arguably, with the rise of the cosmopolitan/revisionist school the above-noted de-emphasis of the authority criterion has reached previously unknown heights. Steinhoff (2007, 7-22) provides a unique entry point to this debate as he is outspoken about his disdain of the classical just war and, furthermore, builds his chapter around an explicit rebuttal of Coates’s argument.

#### **4.2.1 Steinhoff's Rebuttal of Coates**

Steinhoff builds his discussion around an explicit rejection of classical just war argument which Coates seeks to recover partly. As he (2007, 2) states in the introduction of his book, "In the course of this enquiry I shall treat traditional just war theory, which goes back to the Catholic Church fathers Thomas Aquinas [sic] and Augustine and has been further developed by other thinkers. This theory will be discussed, yet by no means adopted; rather, some of its central points are rejected here." With regard to the criterion of "legitimate authority" in particular, Steinhoff (2007, 3) leaves little doubt about his opposition towards the classical just war and the latter's granting of the right to war to public authority only. "(...) the view that such rights are attributable only to the state and its representatives, but not to the individual, is pre-Enlightenment and pre-modern, namely medieval, or modern in the bad sense of belonging to a metaphysics of the state and having certain totalitarian tendencies."

In contrast to the classical understanding, Steinhoff (2007, 3) provides his take which, in a nutshell, summarises the cosmopolitan/revisionist argument on legitimate authority. "(...) I shall argue, contrary to the tradition of just war theory, that every single individual is a legitimate authority and has the right to declare war on others or to the state, provided only that the individual proceed responsibly in his or her decision processes, that is, that one proceed in circumspect and rational consideration of relevant information and moral aspects. This is merely a thoroughgoing application of a perspective which is enlightened, liberal and oriented to individual rights, a perspective which I am at pains to adopt throughout."

Steinhoff (2007, 7) starts off his discussion of "legitimate authority" by quoting Coates's argument that the authority criterion has become the most neglected of all. He goes on to state that Coates insists that war can only be waged between legitimate authorities which he describes as "a view which, as far as I can see, has found no

second exponent in the long tradition of just war theory.” As terrorists, for Coates, are criminals rather than combatants with no greater war-time rights of harming, Steinhoff quotes Coates’s conclusion that the authority criterion takes on a particular importance in the confrontation with terrorism. Having provided this basic summary of Coates’s argument Steinhoff (2007, 8) immediately jumps into rebuttal mode. Accusing Coates of an “uncanny realm of double standards,” Steinhoff first takes issue with Coates’s suggestion that terrorism equals the use of force by “illegitimate authorities.” Employing a realistic thought experiment, Steinhoff is unwilling to accept the idea that legitimate authorities cannot commit terrorism. “If Hamas - or better yet – if unorganized single fighters in the Gaza strip blow up an Israeli tank (which, according to international law and the laws of war, is a legitimate action against soldiers of an occupying power, or at least no war crime), it is terrorism; if Sharon, elected democratically, has helicopters fire into groups of Palestinian civilians (according to international law and the laws of war unequivocally a war crime), it is at once something completely different” (2007, 8).

With regard to moral debate, Steinhoff charges that Coates neither explains why nor how the authority criterion should be considered to be “logically prior” to the criterion of non-combatant immunity. Steinhoff asks whether Coates intends to completely leave it to those in authority to decide who can be targeted which would, if completely thought through, reduce the authority criterion to an “enabling act” (2007, 9). “If, therefore, the legitimate authority says: ‘I hereby declare that the children of our enemies are combatants; therefore, let us first bomb the kindergartens, the children’s homes and clinics, for then our enemies will be demoralized and knuckle under’, is that alright then?” (2007, 8). Furthermore, Steinhoff (2007, 9) flatly rejects Coates’s argument that an attack on an armed soldier or policeman in his function as representative of the political community should be considered more reprehensible than an attack on an unarmed civilian as an indefensible moral intuition.

Having pointed out these two ostensible flaws in Coates's argument Steinhoff examines further possible rationales for defending the classical authority criterion. He begins with the emphasis of authority as a means of decreasing the occurrence of war through limiting the outbreak of private violence which Coates upholds in his argument for the public monopoly of force being a pre-requisite of civilised society. For Steinhoff, the problem with this argument is that while the public monopoly of force may be a precondition for civilised society, the breaking of this monopoly has historically proven to be "an indispensable precondition for democratization" (2007, 9). Again providing an illustration: "This depends on what one means by 'civilized'. If Louis XIV had succeeded in monopolizing the violence in his state, we might today be dealing with an absolutist French neighbour, with Louis XXI instead of with Jacques Chirac; and if the British had succeeded in enforcing the public monopoly of the use of force, the USA would perhaps still be a colony of Great Britain" (2007, 9).

In addition, also speaking against Coates's pacification argument, for Steinhoff, is the fact that while the authority criterion may reduce the number of conflicts within society, it does not decrease violence taken as a whole. In other words, while the criterion might reduce the number of actors justified in fighting it does not rein in the use of force by legitimate authorities. "In fact, the greatest crimes in human history have been committed by states or empires, not by subnational terror groups or guerrilla movements" (2007, 10).

A further problem for Steinhoff is that Coates seems to confuse society and state in his argument that modern revolutionary war resembles pure countervalue warfare as it necessarily descends into total war. Steinhoff denies this assertion by arguing that it is a mistake to equate society and state as it might well be that the state acts against society. "The revolutionary movements in El Salvador and Nicaragua, for example, by no means fought against the society, but rather represented it; nor did they wage a total war – the governments did that (...)" (2007, 10). Moreover, Steinhoff

takes issue with Coates's assertion that the classical just war criterion of authority was much more demanding than the one employed today. Alluding to Coates's point that legitimate authority has disadvantageously been equated with state sovereignty in the Westphalian system and thus lost its stringency, Steinhoff considers this a wrongful reading of history "as in fact medieval theorists for the most part subsumed legitimate authority to the sovereignty of the ruler" (2007, 10).

In addition, Steinhoff makes an attempt to reveal the basic flaw of inconsistency in Coates's rejection of revolutionary movements. Given that Coates accepts the right of resistance in cases when a government turns against society, "he of course also admits that a revolutionary movement can *itself* be a public force that is, force legitimized by the community" (2007, 11-12). Once more resorting to a thought experiment (2007, 12): "In other words (and with particular regard to the question of terrorism), if, for example, the community that stands behind the members of the Israeli army is a legitimate authority and can therefore make the Israeli soldiers agents and executives of public force, why should the community that stands behind the members of, say, Hamas not be such a legitimate authority, making the Hamas fighters the agents of publicly legitimized force?"

Next, Steinhoff laments that Coates, even though he so forcefully insists on the authority criterion, does not clearly delineate the scope of the principle. While Steinhoff applauds the fact that Coates does not make the frequent "error" of democrats to consider democracy as a cure-all, the problem that unfolds is that the essence of the authority criterion remains unclear (2007, 12). What it comes down to for Coates, according to Steinhoff, is "that a legitimate authority is one which is a legitimate (whatever that may precisely mean) representative of a community and, in addition, one which abides by the law (whatever the law may actually be) that is valid for interstate or intercommunity relations" (2007, 12). With such a definition, however, Coates, in Steinhoff's eyes, contradicts himself. As principles such as just

cause and non-combatant immunity are enshrined in international law, Steinhoff reasons, Coates cannot uphold the claim that the authority criterion is logically prior. Quite the contrary, legitimate authority depends upon these criteria: “An actor who enters armed conflicts without just cause and without respect for the principle of non-combatant immunity does not have legitimate authority. Hence, the question of legitimate authority would be settled with reference to the criterion of non-combatant immunity, and Coates’ criticism of the neglect of the former in favour of the latter would contradict his own previous statements” (2007, 12).

After having dissected the ostensible contradictions in Coates’s interpretation of the authority criterion Steinhoff (2007, 18-20) finally turns to the source of Coates’s argument, namely the classical just war. In essence, he identifies the “anti-individualist and collectivist prejudice” (2007, 18) of medieval thought as the origin of the classical authority criterion.

The idea that a single individual has the right to defend his or her rights against those who do not respect them and, if necessary, may do so with violence and against the state, and, moreover, that he or she has the right to violently punish rights violators, even if they appear in the form of a right violating state, was alien in the Middle Ages – just as alien as the idea of individual rights. Medieval, too, is the considerable dose of metaphysics necessary for thinking that a community can have the right to punish, but that a single individual cannot have such a right. *Whence* can the community have such a right if it does not derive it from the individuals who come together to form the community? In contradistinction to the church fathers, the view of a *liberal* theorist such as John Locke is, in any case, that a community can only have the rights which its members transfer to it. There is no miraculous increase of rights by representation. (2007, 18-19)

Next, Steinhoff turns against the pacification argument, namely the idea that those invested with the responsibility for the common good of the community have the right to use force in order to prevent a situation in which anyone may employ force according to his or her liking. “For medieval thinkers ‘civilized living’ consisted perhaps not least in a situation in which authorities supposedly appointed by God told the subjects, at whose expense they were living, what to do and what not to do.

That such thinkers should set the highest value on the principle of legitimate authority is perhaps due more to their own self-interest than to their care for the public. But, whatever the motivation of these anti-liberal thinkers might have been, the fact is that thinkers like Locke have a good answer to this conjuring up of an allegedly ‘very real threat of anarchy’” (2007, 19).

This ostensible answer Steinhoff derives from John Locke who argues along the lines that the individual right to use force against an unjust ruler need not lead to anarchy as the criterion of just cause still applies (2007, 19-20). This argument, in turn, leads Steinhoff (2007, 20) back to his accusation against Coates of employing a double-standard because the latter “explains that the state can function as a militant defender of international law and that it draws its legitimization to wage war precisely from this role as the defender of law. He does not admit to the objection that nobody can be a judge (and, it must be added, an executing officer) of his own cause.”

The conclusion Steinhoff (2007, 20) draws from his reflections on Coates’s argument on legitimate authority provides a basic summary of the revisionist school’s take on the criterion which will be considered next in more detail. “Contrary to just war theory, individuals – or more or less unorganized groups, for that matter – do not need the mediation of a representative (as in Catholicism) in order to gain legitimate authority for waging war; rather, they bear this authority themselves. If, under certain conditions, a *right to war* comes into operation, it is, or is based upon, an *individual right*.”

#### **4.2.2 The Broader Cosmopolitan/Revisionist Argument**

Fabre (2008, 2012) provides the most concise formulation of a cosmopolitan/revisionist just war approach. One particular advantage of her contribution, as far as authority is concerned, is that, in contrast to many members of her school, she does not concentrate on analytical construction but employs historical illustrations. Fabre (2008, 964) starts her argument by describing the status quo of

the Westphalian understanding of “legitimate authority:” “(...) the requirement of legitimate authority confers the right to resort to war on states and coalitions of states – to wit, on sovereign political organizations with the power to enforce laws within a given territory.” She adds that as a consequence of decolonisation the right to war has also been granted to political movements engaged in wars of liberation against oppressive rulers. However, this in historical terms very recent development does not, according to Fabre, diminish the “central aims” (2008, 964) of the Westphalian authority criterion, namely to justify the use of force as a defence of states’ rights to territorial integrity and political sovereignty. These “still rather statist overtones” (2008, 964), according to Fabre, have been challenged recently by a revival of the cosmopolitan tradition whose core precepts she defines as:

(a) individuals are the fundamental units of moral concern and ought to be regarded as one another’s moral equals; (b) whatever rights and privileges states have, they have them *only* in so far as they thereby serve individuals’ fundamental interests; (c) states are not under a greater obligation to respect their own individual members’ fundamental rights than to respect the fundamental rights of foreigners. According to cosmopolitans, individuals’ basic entitlements are independent of political borders, and states have authority to the extent that they respect and promote those entitlements. (2008, 964)

Given this definition, it should come as no surprise that cosmopolitans, due to their stress of individual morality and scepticism toward the state, are considered to belong to the revisionist school. The overall goal of Fabre’s argument is to advocate the abandonment of the authority criterion based on cosmopolitan grounds (2008, 965). Interestingly, as Fabre is willing to acknowledge, her argument has “Lockean undertones” (2008, 965), undertones already encountered in Steinhoff’s work. Having said that, she emphasises that her argument also partly departs from Locke.

With Locke, I will argue (a) that a state is legitimate to the extent that it protects its members’ fundamental rights; (b) that a people may resort to war to overthrow an illegitimate state; (c) that individuals acting alone have the right to go to war against unlawful foreign belligerents. Unlike Locke, however, I do not claim that a state is legitimate if, and only if, it rests on the people’s consent. Nor do I restrict the conferral



of the right to wage a (civil) war on a whole people, through a *levée en masse*. Finally, my arguments in support of my Lockean conclusions are drawn from the contemporary literature on cosmopolitanism (...) (2008, 965)

In her argument, Fabre (2008, 968) questions the assumption of the Westphalian authority criterion that in order to wage war the agent must be a political community built around communal political ends, namely those of territorial integrity and political sovereignty. Fabre rejects this argument, claiming that non-political groups and individuals can have the right to wage war. This argument stands against claims such as Coates's that a sovereign authority is a necessary pre-requisite for a functioning and peaceful political community. Bartelson (2010, 82) refers to this traditional argument as "double bind."

(...) the cumulative consequence of past efforts to justify war with reference to legitimate authority has been to create a *double bind* between conceptions of political authority on the one hand and the use of force on the other. Therefore, if we want to make some historical sense of the just war tradition, we ought to conceive of the relationship between legitimate authority and the use of force as a two-way street: not only does the justification of war require legitimate authority, but this authority has frequently been legitimized with reference to the violence and disorder that would ensue in its absence.

Cosmopolitans oppose this two-way street argument. Fabre's basic justification for abandoning the established authority criterion is that communal goods such as territorial integrity and political sovereignty are only the accumulation of individual goods and thus there is no moral value to communal values as such; they are only precious as an extension of the rights of individuals. Consequently, for cosmopolitans the right to war is less limited, going beyond the defence of accumulated individual rights as expressed in the communal rights of the Westphalian standard. The right to war thus also falls to those individuals who must defend their rights to a, in cosmopolitan terms, "minimally flourishing life" (2008, 969) as expressed in basic human rights. Simply put, "it is not necessary, for an entity to have the right to wage a war, that it be a legitimate authority" (2008, 969).

## **4.3 St Thomas on Authority**

### **4.3.1 The Basics of Thomistic Political Philosophy**

The following discussion is indebted to Koritansky's (n.d.) treatment of St Thomas's political philosophy as it adopts logic and structure of his argument, referring to other voices only as a matter of additional clarification. Direct references to Aquinas's writings will be, due to space concerns, used sparingly. At the outset, it must be said that this section can provide only the most basic of overviews of Thomistic political thought. Therefore, the main concern in this section will be the formation and functioning of temporal government. This is an important assertion to make as St Thomas in contrast to, for example, Aristotle whose thought he partly adopts, was a theologian who, while providing an ethical framework for humankind's earthly existence, never lost sight of the final goal of human life, namely beatitude or perfect happiness in the world to come. In other words, Aquinas's thinking on temporal government must be seen as an "interim ethic" (Weigel 1987, 358) in which government takes on the responsibility for establishing and maintaining the natural goods of earthly life, thus providing the basis for human beings so that they can strive for their supernatural perfection. As Scully (1981, 414) notes, "This tenet of Christian faith and reason, which permeates the thought of St. Thomas, plays a significant role in his political philosophy, allowing, as it does, for elements of a spiritual and moral character within society and the individual person that transcend the power and authority of the State."

For St Thomas, the Church takes on a crucial task in guiding mankind to beatitude. However, the relationship between state and Church has often been uneasy with each side attempting to take over control within the affairs of the other. The Angelic Doctor (ST, II-II, q. 60, a. 6) himself argues that "The secular power is subject to the spiritual, even as the body is subject to the soul. Consequently the judgment is not usurped if the spiritual authority interferes in those temporal matters that are

subject to the spiritual authority or which have been committed to the spiritual by the temporal authority.” Although important for Thomistic thinking, addressing the complex relationship between the “two powers” lies beyond the scope of this thesis. For a widely cited discussion of this topic see Eschmann (1958). In what follows, discussion concentrates on the power of worldly government while humbly adding the caveat that, for St Thomas, things are more complex than presented here.

#### **4.3.2 Human Nature and Natural Law**

A good point to start reflection on his political philosophy is Aquinas’s doctrine of natural law which takes a central role in his moral and political teaching (Koritansky n.d.). For St Thomas, God created the world and endowed each and every element with a certain nature, its essence. Importantly, a thing’s nature does not only show in its outer, external appearance; it also shows through its natural inclinations. These inclinations guide it to act according to its particular nature. The divine authorship as well as God’s continuing involvement in the world, for Aquinas, can be called a law (Koritansky n.d.). St Thomas (ST, I-II, q. 90, a. 4) defines law as “an ordinance of reason for the common good, made by someone who has care of the community, and promulgated.” The law governing the world Aquinas calls the *eternal law* which is eternal because it does not result from the world which it governs but from whom it is derived, God (Koritansky n.d.). In most cases, God governs his creation through the eternal law without any chance of it being disobeyed as most beings lack the rational ability to consciously act against the eternal law. The only exception is the human being who, despite being subjected to divine providence and eternal law, possesses the power to act against the eternal law (Koritansky n.d.). Due to its rational nature, humankind’s relationship to the eternal law, in fact, is so different that Aquinas prefers to give it another name in its application to human nature, namely natural law. The natural law functions as determiner of human behaviour and thus provides the foundation for morality and politics (Koritansky n.d.). As pointed out earlier, St

Thomas's ethics is teleological. The natural law effectively "guides human beings through their fundamental inclinations toward the natural perfection that God, the author of the natural law, intends for them" (Koritansky n.d.). Aquinas essentially considers "ethics as the study of how human beings can best fulfil their nature and obtain happiness" (De Young, McCluskey and Van Dyke 2009, 3).

Importantly, the precepts of natural law are instilled in the human mind; they are the result of an intellectual habit called *synderesis* (ST, I-I, q. 79, a. 12). Having said that, however, naturally knowing the first precepts of natural law through *synderesis* does not immediately make human action. Rather, the principles have to be applied according to circumstances. The act of applying the understanding of the demands of natural law to concrete circumstances Aquinas calls *conscience* (ST, I-I, q. 79, a. 13). Koritansky (n.d.) provides the following practical example of the interplay between *synderesis* and *conscience*: "Therefore, by means of *synderesis* a man would know that the act of adultery is morally wrong and contrary to the natural law. By an act of *conscience* he would reason that intercourse with this particular woman that is not his wife is an act of adultery and should therefore be avoided." De Young, McCluskey and Van Dyke (2009, 6) provide a summary that pulls together the strings encountered so far: "What it means for us to be created in God's image, according to Aquinas, is, first and foremost, that we possess intellect, will, and the resulting ability to act on our own power. This link to the Creator further explains why our function involves both reasoning well and acting on the basis of that reasoning. We have intellects and wills, capacities that allow us to discover what our powers to act are intended *for* and how we are meant to act. In short, we are teleological beings, created by God with a particular function and for a particular purpose."

The precepts of natural law are derived from the very first demand that "good is to be done and pursued, and evil is to be avoided" (ST, I-II, q. 94, a. 2). In order to specify this most general precept St Thomas points toward the natural inclinations of

human beings. Natural inclinations function as the most basic guide to comprehending the natural law (Koritansky n.d.). These inclinations are firstly those “in accordance with the nature he has in common with all substances (...) such as preserving human life and warding off its obstacles;” secondly those man shares with other animals, for example “sexual intercourse,” and the “education of offspring and so forth;” thirdly those which are specific to the rational nature of man, namely to “know the truth about God,” to “shun ignorance,” and to “live in society” (ST, I-II, q. 94, a. 2). Importantly, solely acting on a natural inclination does not make an action morally good. Rather, inclinations are only part of the natural law if they are subjected to reason (Koritansky n.d.).

### **4.3.3 The Need of Political Society**

Moving on to St Thomas’s political philosophy Koritansky (n.d.) points to the natural inclination “to live in society” as the “ideal point of departure.” Building on Aristotle, Aquinas considers political society as a natural result of man’s political nature. Rather than being a construct of human invention, as contract theorists would argue centuries later, political society resembles “a prompting of nature” (Koritansky n.d.); man naturally aspires to it and it is needed for perfecting his existence. St Thomas “considers the social realm grounded in man’s physical, intellectual and moral need for assistance from his fellow man and in a basic love that one man has for another” (Scully 1981, 407).

Furthermore, Aquinas’s positive understanding of the state differs from the earlier Augustinian understanding which essentially considered the state to be a means of restraining man’s prelapsarian *libido dominandi* (Weithman 1992, 354). Logically, as human beings find fulfilment only in living together well in the political community St Thomas puts particular emphasis on the common good. Like Aristotle, St Thomas reasons upward from the other natural communities.

In the first, he holds that the State is natural insofar as it is the end of a natural, generative process. This process, he explains, commences with the union of man and

woman, giving rise to the domestic society of the family and household, which provides for daily needs. It continues through the wider and more complex society of small communities, which can provide more completely for the needs of its members. And it culminates in the still wider and more complex political society of the State, which as a *perfect* or complete society, provides most fully for individual needs. The needs include not only the needs of life itself, but the needs of the good life – the life of virtue, to which the laws of the State are ordered. (Scully 1981, 409-410)

Importantly, although the state is natural to human nature it still is the fruit of human action which may require, if completely thought through, the use of violence. As Scully (1981, 412) puts it, “This does not mean, of course, that man is born with the State any more than a man is born with virtue, for States are founded through human industry and virtues are acquired through human experience.” Moreover, an important implication of man’s political nature is the role of citizens in political society. Due to his nature as “civic and social animal” (ST, I-II, q. 72, a. 4), the good citizen is the one who puts the interest of the common good above his private interests.

When it comes to determining the best regime for political society, Aquinas has been interpreted by different scholars as “advocate of absolute monarchy, limited monarchy, republicanism, and mixed constitutionalism” (Blythe 1986, 547). The following discussion sides with Koritansky (n.d.) who states that Aquinas distinguished between the best regime in theory and the best possible regime. To begin with, St Thomas adopts Aristotle’s classification of six basic regime types. These are distinguished based on the criteria of how the political society is ruled (by one, few, many) and of whether the rule is just through the determiner of its contribution toward the common good. The regimes that are just Aquinas calls, respectively, monarchy, aristocracy, polity or republic whereas the unjust regimes are labelled tyranny, oligarchy, and democracy (Koritansky n.d.). Monarchy, for Aquinas, constitutes the best regime type as the wise monarch is uniquely capable of leading society to the common good and would only be hindered in carrying out this task had he to consult others who are less wise. However, St Thomas does acknowledge that monarchs who are not as wise as the ideal monarch would be may not rule as

effectively and, in the worst case, may become tyrants who work for their private ends instead of for the common good. As a result, Aquinas makes a distinction between the best regime “simply speaking” and “the best regime in a particular time and place” (Koritansky n.d.) which, for Aquinas, might be a mixed regime which combines the virtues of monarchy, aristocracy, and polity.

Therefore, Aquinas outlines in the *Summa Theologiae* a more modest proposal whereby political rule is somewhat decentralized. The regime that he recommends takes the positive dimensions of all three “good regimes.” Whereas it has a monarch at its head, it is also governed by “others” possessing a certain degree of authority who may advise the monarch while curbing any tyrannical tendencies he may have. Finally, Aquinas suggests that the entire multitude of citizens should be responsible for selecting the monarch and should all be candidates for political authority themselves. (Koritansky n.d.)

An important issue which will again become relevant in the discussion about the morally appropriate regulation of targeted killings can be found in the relationship between government and its people. In emphasising the uniqueness of human nature among all creatures Aquinas, following Aristotle, stresses the importance of speech as an inherent aspect of the political nature of human beings. From this, for Aquinas, it follows that human beings “are to be served by way of a medium that is in keeping with the very nature of man’s fundamental relatedness of man to man in society on every level, namely, dialogue” (Scully 1981, 428). As a result, St Thomas holds that government authority, if true to human nature, must give a voice and listen to the community for which it takes care.

The governmental, legislative wing of society at society’s highest point of development makes society a political society or a State. Though, within a large and complex society, this governmental, legislative wing must be somewhat removed in the actual exercise of governing, it remains, nevertheless, essentially tied to the society from which it arises. Its function is to serve that society and its members by promoting an environment in which local communities, families and individuals may subsist and develop as human, rational, moral beings. Consequently, the authority of State-government, however much an authority, cannot be regarded as absolute, for it remains subject to the common interests of the members of society, who ultimately have the last word. (1981, 428)

It is important to note that although St Thomas doubtlessly saw a place for the involvement of the public in the political decision-making process it would be a mistake to read him as advocate of something he, in reality, did not argue for. As Crofts (1973, 163) warns “Thomas emphasized the importance of popular sovereignty but the interpreter must not ascribe to the political theory of Thomas a democratic tone that sounds too modern. Thomas was not a democrat; he believed that the source for political authority was not so much popular sovereignty as it was the divine will.”

In cases where the government does not listen or when it willingly acts against the common good it should come as no surprise that St Thomas, as noted by Coates, imagines a right of resistance. How far St Thomas is willing to go in granting a right to resistance has been subject to considerable debate as his position varies according to which of his works is consulted. That he allows for resistance as response to a ruler’s blatant disrespect of the responsibilities which have been bestowed on him, however, is uncontroversial (see, e.g., Blythe 1986; Crofts 1973; Johnson 2014, 32-33; 41-43; Johnstone 2003; Reichberg 2017, 122-127).

#### **4.3.4 Aquinas’s Additional Types of Law**

Although the demands of natural law provide the basis for human action they do not specify all particulars of human behaviour. To cite an example that is particularly relevant for the later discussion of how targeted killings should be regulated Koritansky (n.d.) points to a shortcoming of natural law: “Whereas Aquinas argues that the natural law requires criminals to be punished for injustices such as murder, theft, and assault, there is no natural specification as to precisely what kinds of punishment ought to be imposed for these crimes.” In order to fill these gaps, St Thomas argues for the necessity of human law as guarantor of maintaining human social life. As the state makes the human law it “aids man in his acquisition of virtue, through which man achieves his human perfection, since the laws of the State restrain him from wickedness, savagery and corruption” (Scully 1981, 412). Following from



this, it is unsurprising that Aquinas has an understanding of individual rights which is quite different from the cosmopolitan/revisionist perception. As Bigongiari (1997, xxxi) puts it succinctly, St Thomas “is more concerned with the stability of the state than with the upholding of individual political rights.” Likewise, Crofts (1973, 166) argues that “Thomas is far more interested in political duties and obligations of the individual in society than in the political rights and privileges to which the individual lays claim.”

Human law, according to Aquinas, has two main functions. Firstly, it contributes the specificity the natural law cannot provide as a consequence of its generality and, secondly, it forces those falling under its authority to keep its requirements. Following from the second function, Aquinas distinguishes between human laws which are “conclusions” from principles of natural law and laws which are “determinations” from natural law (Koritansky n.d.).

Human laws are considered conclusions from the natural law when they pertain to those matters about which the natural law offers a clear precept. To use Aquinas’ own example, “that one must not kill may be derived as a conclusion from the principle that one should do harm to no man.” (ST, I-II, 95.2). Thus, human laws must include prohibitions against murder, assault, and the like even though such actions are already prohibited by the natural law. At the same time, however, the natural law does not specify exactly how a murderer must be punished, whether (for example) by means of banishment, the death penalty, or imprisonment. Such details depend upon a number of factors that prudent legislators and judges must take into consideration apart from their understanding of the general principles of natural justice. (Koritansky n.d.)

Direct conclusions from the natural law Aquinas calls the laws of nations (*ius gentium*) which are thus common principles of human law valid above and beyond any particular regime (Koritansky n.d.). St Thomas discusses one further type of law, namely the divine law. In essence, the divine law is the part of the natural law which God has given to mankind through revelation. It thus cannot conflict with the natural law human beings derive through *synderesis*. Unsurprisingly, the Scholastics put considerable effort into justifying the non-contradiction of reason and faith (Bellamy 2006, 37).

## **4.4 The Historical Background of Contemporary Debate about Authority**

The following section draws heavily on Johnson's (2007, 2013b, 2014) work on authority in which he points out the differences between the classical and the modern Westphalian understanding of sovereignty. Importantly, while discussing the differences between the two understandings, this section does not have the space to narrate the historical developments behind the abandonment of the classical understanding. Furthermore, it should be noted that the Westphalian settlement did not bring about changes in state conduct overnight. Quite the contrary, the modern understanding of sovereignty was arguably only firmly established in the twentieth century (see, e.g., Glanville 2013; Stirk 2012).

### **4.4.1 Classical Sovereignty**

Johnson traces back the historical development behind what he considers to be a modern over-emphasis of the just cause criterion which, as he argues, has resulted in the neglect of the authority criterion. Describing the classical understanding of the authority criterion, most succinctly put forward by St Thomas, as in sync with the "ends of good politics," Johnson (2013b, 19-20) provides the following summary of this interpretation:

Here the primary necessity for a just war is sovereign authority; the other necessities named not only follow in precedence but also depend importantly on that authority, for among the responsibilities included in those of sovereignty are determining when there is a just cause for resort to armed force on behalf of the political community and maintaining right intention in the use of such force.

This is a conception placed squarely within the frame of an understanding of the ends of good politics. For the medieval writers, these were defined in the terms of the three interrelated "goods" of politics – order, justice, and peace – as taken over from earlier Classical thought by Augustine. The just war conception of sovereign authority reflected the good of political order; the conception of just cause reflected the good of justice within the political community; and the conception of right intention corresponded to the good of peace within that community. More broadly,

this understanding also extended to relations between and among political communities, as disorder, injustice, and conflict in one community inevitably affected the well-being of neighboring communities.

Before moving on, it should be noted that Johnson's interpretation of what St Thomas had to say about authority rests on the Angel of the School's definition of just war in which he listed the authority criterion in first place (ST, II-II, q. 40, a. 1). Johnson subsequently argues that Aquinas considered the authority criterion as the most important one of just war, logically prior to all the other criteria. However, this position has not been unanimously embraced. Reichberg (2017, 115-116), for example, does not consider St Thomas to argue that the authority criterion constitutes "a formal precondition of just cause," as Johnson does.

St Thomas as systematiser of the classical just war benefited a great deal from the canonical debate which had taken place before his own days. His thought was also deeply influenced by the revived interest in natural law during his days which held, as discussed above, that the political community was the result of "a natural bonding among persons for their common good, with the ruler bearing the overall responsibility for maintaining and protecting that good" (Johnson 2014, 36).

Johnson (2013b, 25) identifies two directions from which the lead role of the authority criterion resulted. The first was the argument that only sovereign temporal rulers had the right to use armed force. In consequence, neither the Church nor private individuals were justified in using such force. This argument, as noted above, was a conscious attempt to rein in a worrisome proliferation of actors who claimed to have the right to use armed force and which had resulted in "widespread banditry and warlordism" (Johnson 2007, 7). The canonists denied the Church the use of force in line with the idea of the two swords which, introduced by Pope Gelasius I in order to distinguish between the ecclesiastical and temporal spheres, resulted in the argument that only the temporal power had the right to employ force. With regard to private individuals the argument was that they could appeal to their superiors in order to

establish or re-establish a state of justice. Only the highest of superiors, the sovereign, had the right to resort to armed force because he alone had no temporal superior (Johnson 2013b, 25). That is why St Thomas argued that “Now in human society no man can exercise coercion except through public authority: and, consequently, if a private individual not having public authority takes another's property by violence, he acts unlawfully and commits a robbery, as burglars do” (ST, II-II, q. 66, a. 8). It was the sovereign's responsibility to ensure a *tranquillitas ordinis*: “Here the right to use force is tied explicitly to the obligation to protect and preserve justice by restoring it when it has been violated and by punishing those persons responsible for the violation” (Johnson 2014, 2). St Thomas (ST, II-II, q. 64, a. 3) thus comes to the following conclusion: “*I answer that*, As stated above [Article 2], it is lawful to kill an evildoer in so far as it is directed to the welfare of the whole community, so that it belongs to him alone who has charge of the community's welfare. Thus it belongs to a physician to cut off a decayed limb, when he has been entrusted with the care of the health of the whole body. Now the care of the common good is entrusted to persons of rank having public authority: wherefore they alone, and not private individuals, can lawfully put evildoers to death.” Theologically, too, this take reiterated the distinction between public war and the illicit private use of force, of which the latter, according to St Augustine, was “inherently unjust because tinged with sinful self-love” (Johnson 2007, 5).

At the same time, the limitation of the use of force to sovereign authority only took on a crucial role with regard to the moral distinctiveness of war which today's revisionist just war theorists so vehemently oppose: “it distinguished *bellum*, war, as an activity on behalf of the common good, from *duellum*, the duel, use of arms by individual knights and nobles without sovereign authority” (2007, 5). The result was “a first instance of a double bind between legitimate authority and the use of force in the context of medieval legal thought. In sum, a war was just by virtue of being waged

by a prince, yet what made a prince a prince was his right to wage war” (Bartelson 2010, 90).

The second direction Johnson identifies was the reflection about “the moral responsibilities and personal characteristics of the ideal or ‘good’ ruler” (2013b, 25). Medieval accounts such as Aquinas’s commonly referred to Romans 13:4 “as a kind of motto” (Johnson 2014, 13) which defined authority, including the authority to use force, as having been bestowed upon the ruler by God: “He beareth not the sword in vain: for he is God's minister, an avenger to execute wrath upon him that doth evil.” As Johnson (2007, 5-6) points out, since the times of St Augustine Christian thinking on authority considered the use of force as a part of the ruler’s responsibility to maintain and establish order in accordance with God’s will. Aquinas contributed a great deal to this literature in that he explained this divine responsibility, as pointed out above, within the context of natural law. In addition, Romans 13:4 also had significance for the character formation of the good ruler because the ruler, as “minister” of God, had to acquire the necessary virtues (Johnson 2014, 13-14). For a discussion of how St Thomas related his account of virtue ethics to the personal characteristics of the good ruler see the discussion in Reichberg (2017, 134-141). It suffices here to note that “the prince or sovereign ruler was defined in moral terms as having ultimate responsibility for the overall good of the political community governed, and this responsibility requires the right of recourse to the sword to deal with both internal and external threats to this good” (Johnson 2013b, 25).

In addition, it has been argued that through his “superimposition of an Aristotelian account of political community on to the received doctrine” (Bartelson 2010, 91) Aquinas gave increased emphasis to the prince’s responsibility of defending the common good. “The authority of the prince is legitimized with reference to his ability to defend the political community against both internal and external enemies. From this point of view, going to war for reasons other than the good of the

community would not only make that particular war unjust, but would also undermine the legitimacy of princely authority” (2010, 91).

It must be said, however, that Bartelson (2010, 95) seems to go too far when he argues that Aquinas’s thinking equates to “relocating the source of legitimacy from the persona of the prince to the body politic.” Aquinas was very much a scholar of his time who believed in the precept of Rom. 13:4. It is thus preferable to side with Reichberg (2017, 114-141) who partly embraces Bartelson’s general argument of St Thomas having emphasised defensive rationales of war, but without denying the punitive and restorative rationales Johnson stresses in Aquinas’s just war. In particular, Reichberg interprets St Thomas as having put forward two arguments for sovereign authority. The first one was the one he inherited from his predecessors and which stressed the responsibility to use force in order to remedy past wrongs. The second one focused on the ruler’s responsibility for the common good and the virtues the ruler had to acquire in order to get there. As a result, as Reichberg (2017, 141) concludes, Aquinas, in this second argument, “prioritized the newly emergent idea of ‘defensive war,’ and prompted a line of reflection that would emphasize non punitive rationales for resorting to armed force.”

The confluence of the two directions which led to the classical authority criterion is indicated in St Thomas’s complete account of authority in war (ST, II-II, q. 40, a. 1) in which he argues that

*I answer that,* In order for a war to be just, three things are necessary. First, the authority of the sovereign by whose command the war is to be waged. For it is not the business of a private individual to declare war, because he can seek for redress of his rights from the tribunal of his superior. Moreover it is not the business of a private individual to summon together the people, which has to be done in wartime. And as the care of the common weal is committed to those who are in authority, it is their business to watch over the common weal of the city, kingdom or province subject to them. And just as it is lawful for them to have recourse to the sword in defending that common weal against internal disturbances, when they punish evil-doers, according to the words of the Apostle (Rm. 13:4): “He beareth not the sword in vain: for he is God's minister, an avenger to execute wrath upon him that doth evil”; so too, it is their

business to have recourse to the sword of war in defending the common weal against external enemies. Hence it is said to those who are in authority (Ps. 81:4): “Rescue the poor: and deliver the needy out of the hand of the sinner”; and for this reason Augustine says (Contra Faust. xxii, 75): “The natural order conducive to peace among mortals demands that the power to declare and counsel war should be in the hands of those who hold the supreme authority.”

Given this foundation, in sum, Johnson (2014, 84) argues that the classical understanding of sovereignty as understood by thinkers like Aquinas was a top-down approach which followed from the responsibilities of the ruler who held responsibility for the common good. It was an understanding of sovereignty that did not, like the modern conception, understand sovereignty in terms of the state and the inviolability of its borders (2014, 2). The ruler took on the function of a judge; a just war “has to do precisely with the execution of justice in response to injustice. This is the function of just war, *bellum iustum*” (Johnson 2013b, 26). In St Thomas’s own words (ST, II-II, q. 66, a. 8): “As regards princes, the public power is entrusted to them that they may be the guardians of justice: hence it is unlawful for them to use violence or coercion, save within the bounds of justice—either by fighting against the enemy, or against the citizens, by punishing evil-doers: and whatever is taken by violence of this kind is not the spoils of robbery, since it is not contrary to justice.” In this regard, Bartelson (2010, 88) speaks of a medieval understanding of authority as law enforcement.

The right to self-defence, in this understanding, was taken for granted. It was a self-evident truth of natural law. That is why in a seminal work Pope Innocent IV (2006, 150-151) did not use the term for war when he referred to defensive uses of force: “It is permissible for anyone to wage war in self-defense or to protect property. Nor is this properly called ‘war’ (*bellum*) but rather ‘defense’ (*defensio*). [One] may lawfully fight back on the spot (*incontinenti*) (...) before he has turned his attention to other matters.” Every person had a right to self-defence and it was considered to be the logical consequence that the political community also enjoyed that right.

Extending beyond mere self-defence, for classical thinkers the responsibility for the common good also included what might be considered as offensive force, namely the right to punish and the retaking of property which had been unjustly seized. Crucially, the common good came in two forms. First, there was the common good of the ruler's own political community. However, there was also the common good of all humanity. In consequence, maintaining and establishing justice and peace could require the use of force both within and without one's own territory (Johnson 2014, 2). In contrast to the modern understanding, in the Middle Ages, there was no sovereignty in the sense that even in the face of grave violations of natural law a ruler had to fear no sanction because of the inviolability of his borders. While the sovereign temporal ruler was the only body to use the sword within the political community there was no such sovereignty between political communities. As Philpott (1995, 356-357) puts it, in the Middle Ages, "every ruler both endured limits within his own territory and enjoyed some claims over the internal prerogatives of other rulers within Christendom." In other words, in the classical just war, it is

(...) the sovereign ruler of each political community as the final repository of responsibility for the good of that community and for the nexus of relations among communities that serves to protect and reinforce the good of all. Here the responsibility to govern is understood as *moral* in character; it is to serve the good of the community for which the sovereign, and only the sovereign, has overall responsibility. Hence, on this conception, the idea of just war is not merely procedural or formal but also serves to establish that only the sovereign has the right to resort to armed force and thus has a monopoly on the use of such force within the political community or on behalf of that community in relations with others. Putting the requirement of sovereign authority first means both that the sovereign is the one who must judge whether a use of armed force in a given case would be just or unjust and whether it would serve peace, and that the sovereign is the one charged with using such force only with a right intention, and thus in the right way. (Johnson 2013b, 23-24)

Within Christendom, there was "moral and legal unity. Although nobody was sovereign within this realm, natural law obligated all of the faithful, and everybody was tied to someone else by some sort of legal bond" (Philpott 1995, 362). That is why



St Thomas (ST, II-II, q. 40, a. 1), immediately following his reference to Rom 13:4, argues that “Hence it is said to those who are in authority (Ps. 81:4): ‘Rescue the poor: and deliver the needy out of the hand of the sinner’; and for this reason Augustine says (Contra Faust. xxii, 75): ‘The natural order conducive to peace among mortals demands that the power to declare and counsel war should be in the hands of those who hold the supreme authority.’” There should thus always be a moment of critical reflection before drawing parallels between medieval and modern-day warfare as the underlying differences in the conceptualisation of the state invite misinterpretation (Beestermöller 1990, 25).

#### **4.4.2 Westphalian Sovereignty**

The modern understanding of sovereignty, “known alternatively as ‘the Westphalian system’ or as ‘the United Nations system’” (Johnson 2014, 1), first comprehensively advanced by Grotius, was a bottom-up approach in the sense that the ruler was only the representative of the people who had the function to protect the rights the people had handed to him, her, or them (2014, 84). As Reichberg (2017, 232) distinguishes between the very different conceptualisations of *respublica* and the modern state: “Aquinas, by contrast, writing as he did toward the end of the feudal period in medieval Europe, conceptualized the *respublica* as an organic entity that was constituted by personal rather than purely formal ties between a lord and his subjects.” Instead of residing with the ruler as the person responsible for the common good of the political community, Westphalia understood sovereignty as a characteristic of the community itself (Johnson 2013b, 21). As Bartelson (2010, 93) notes, “With Grotius, the legitimate authority necessary to justify warfare was firmly located in the modern state, and defined in terms of its sovereignty. Sovereignty in turn was understood as the supreme and indivisible authority within a given territory, its legitimacy deriving from the tacit consent of self-interested subjects themselves

enjoying a right of self-preservation analogous to that of states coexisting in a state of nature.”

Westphalia constituted a pendulum swing away from Aquinas’s natural law ethics as Grotius, while still a Christian thinker himself, grappled with an understanding of sovereignty that de-emphasised its divine origin. As Hehir (1992, 238-239) puts it, “The transmission of the normative doctrine from Augustine to Aquinas had presupposed the framework of the *Respublica Christiana*, a political system which was profoundly altered by the rise of the lay-state in the fourteenth century and the rise of the nation state in the sixteenth century. The Spanish scholastics and Grotius were all involved in the effort to salvage the substance of the natural law ethic, and specifically the just war teaching, in a new setting where princes no longer acknowledged a higher authority in the world of politics or religion.” Following from this new understanding, authority was limited to the self-defence of the territorially defined political community.

The essentials of this conception of sovereignty were a particular national territory inhabited by a particular people with their particular history, expressed in the patterns of everyday life and in their laws, customs, and institutions, and the right of the people to defend all this against any challenge to it. In this understanding two characteristics stand out: the definition of sovereignty in terms of territory that may be defended and the concept of the people as having one fundamental right, that of self-defense, whose exercise they delegate, within the political community, to their rulers for defense of the entire national territory. (Johnson 2014, 1)

Had it been a command of natural law during the Middle Ages to rectify a tyrant’s grave violations of that law, he could now act with impunity within his own borders. As Philpott (1995, 364) summarises, “Westphalia set new standards for each of sovereignty’s three faces. It made the sovereign state the legitimate political unit. It implied that basic attributes of statehood such as the existence of a government with control of its territory were now, along with Christianity, the criteria for becoming a state. Finally, as it came to be practiced, the Treaty removed all legitimate restrictions on a state’s activities within its territory.”

Instead of starting with the authority criterion, contemporary just war thinkers start with considerations of justice as expressed in the just cause criterion. Both Walzer, due to his indebtedness to international law, and revisionists, who reason from the principle of individual self-defence, embrace this modern understanding. The problem that results, according to Johnson, is that in this understanding it remains unclear who is responsible for deciding on matters of justice. As he (2013b, 21) laments: “Who makes the decision regarding justice? That is left unclear; but perhaps it is the moralists, or perhaps it is public opinion, or perhaps it is the law itself and the lawyers who interpret it. In any case, the role of the political authority is secondary, reacting to whatever has been determined by the appropriate experts with regard to justice.”

While Johnson detects the prototypical statement of the modern understanding of authority in recent statements by the US Catholic bishops the revisionist just war camp has arguably been willing to go even further. While contemporary just war thinkers like the US bishops, according to Johnson (2013b, 20), have relegated the authority criterion to second or third place some revisionists seek to abandon it altogether. In a sense this move is unsurprising given that most revisionists’ sole interest is in finding the moral truth and they have no second thoughts about whether they actually have the authority to decide whose conduct is just or unjust. As Johnson (2013b, 24) notes, the role of the moralist was more limited and modest in the classical just war: “Within this frame specialists in moral thinking, along with specialists working from other perspectives, may (and should) offer advice, but final judgment rests with the sovereign, because the responsibility for the good of the community rests on him (or her or, in rare cases, them).”

## 4.5 Collectivists, Individualists, and Sovereign Authority

Rather than being the result of flawed reasoning by collectivist thinkers, the differences between the classical and revisionist/cosmopolitan take on authority resonate from distinct philosophical points of departure; the main difference, as it turns out, lies in their use of different units of analysis. While the classical just war bestows special value on the political community it is the individual, for revisionists, who functions as the entry point of moral debate. In taking political communities as primary unit of analysis it should be noted that Walzerians in actual fact have “much in common with classical Aristotelian approaches to the *jus ad bellum*, like that offered by Aquinas” (O’Driscoll 2009, 33).

In what follows, the points of critique which surfaced in the above discussion of the revisionist/cosmopolitan argument will be considered. As it turns out, while Steinhoff is correct in parts of his rebuttal of Coates, his critique does not succeed against the classical just war of St Thomas. An unbiased investigation concludes that what Steinhoff considers to be the moral truth is only the result of his individualist starting point. The collectivist classical just war, due to its different starting point, arrives at opposite conclusions. Besides considering the rather narrow dispute between Coates and Steinhoff this section seeks to illuminate the differences between collectivists and revisionists from a broader perspective. Therefore, the discussion will consider additional aspects of the debate which only partly featured in the above discussion of the two authors. In order to do that, Reitberger (2013, 66) provides a fairly comprehensive list of charges against what he calls the “Legitimate Authority Requirement (LAR)” the most important of which will be considered before the background of different philosophical outlooks. In particular, Reitberger questions

(...) that the LAR is necessary in order to promote peace and stability; that non-authorities have access to arbitration and redress from states, hence do not need to wage war; that just war is similar to law-enforcement and must be similarly restricted; that only those representing a political community have a right to wage war on behalf of it; that the LAR improves the chance that wars will be fought for just reasons (*jus*

*ad bellum*); that the LAR is necessary to maintain the distinction between combatants and non-combatants and preserve non-combatant immunity; and finally, that the LAR is necessary to establish an effective chain of command, greatly improving the chances that wars will be fought with just means (*jus in bello*).

#### **4.5.1 Steinhoff's Particular Critique of Coates**

This section first considers the aspects in which Steinhoff's objections succeed before the discussion turns to the aspects in which his critique misses the point. As it turns out, while the majority of his objections are unfounded and only seem to be the result of different starting points of analysis, even in the cases where Steinhoff has a point against Coates, he fails to contradict the Thomistic just war.

To begin with, Steinhoff (2007, 10) claims that "the greatest crimes in human history have been committed by states or empires, not by subnational terror groups or guerilla movements." He charges that Coates (2016, 149) is incorrect in arguing that "modern revolutionary war is countervalue warfare in its purest form." Here, in fact, one encounters the first instance where Steinhoff's critique succeeds. However, Steinhoff only succeeds against Coates, not against the classical just war generally, certainly not against the Thomistic just war. To begin with, as indicated above, while Steinhoff is arguably correct that the greatest crimes have been committed by states, this does not amount to a contradiction of the requirement of sovereign authority as these wars did not meet the criteria of just cause and right intention and were thus unjust wars. Steinhoff seems to be correct, however, that Coates's claim that modern revolutionary war is always unjust is flawed. The reason why this is the case leads back to the discussion of resistance undertaken in the previous section. In cases of blatantly unjust rule, St Thomas, although he would stress the virtue of prudence in this regard, would acknowledge a right to act against the tyrant. He thus does not rule out revolution *per se* and he would not hold, as Coates seems to do, that any revolutionary war has to be indiscriminate and disproportionate.

Steinhoff detects another flaw in Coates's argument which, upon closer investigation, in actual fact turns out to be problematic, but which does not contradict the classical just war. Rather, Coates seems to part with the classical take in this instance. Steinhoff (2007, 12) accuses Coates of a contradiction in that he defines a legitimate authority as an authority

(...) which is a legitimate (whatever that may precisely mean) representative of a community and, in addition, one which abides by the law (whatever the law may actually be) that is valid for interstate or intercommunity relations.

With such an understanding of legitimate authority, however, Coates contradicts himself. Since he doubtlessly regards the requirements of *causa justa* and non-combatant immunity, which are (among others) necessary for the legitimization of war, as constituents of international law, legitimate authority is, against his claims, by no means logically prior in his conception, but rather dependent upon these requirements: an actor who enters armed conflicts without just cause and without respect for the principle of non-combatant immunity does not have legitimate authority.

For the classical just war, sovereign authority considered acting according to the natural law as a non-negotiable pre-requisite. Coates (2016, 143-144), however, states that "even when an individual state acts ostensibly on its own behalf, if it acts in defence of its legitimate interests or in vindication of its rights, it acts at the same time as the agent and representative of the international community. In order to be authoritative, the defence of its 'particular' right must constitute at the same time an upholding of the rule of international law and of the shared values in which the common good of the international community consists."

Assuming that Coates in his reference to international law refers to positive international law Steinhoff is right to argue that Coates contradicts himself as natural law and positive international law are at odds with each other in many respects. Had Coates referred to the natural law instead of international law his claim that the authority criterion is logically prior would not have been a contradiction. Natural law takes for granted that man, in order to lead a flourishing life, must live in society. In other words, from a natural law perspective, Coates's second of the two elements

needed for legitimate authority, abiding by the law, would be redundant; both aspects are part of the natural law.

Importantly, one might even go further than Steinhoff's critique. The classical just war, following the first principle of natural law, stressed that a just war had to discriminate between the guilty and the innocent. Current positive international law, however, holds that once war has broken out combatants on both the just and unjust sides enjoy the same rights. Admittedly, as noted earlier, St Thomas's just war was flexible enough to consider granting equal rights to soldiers fighting for an unjust cause. However, granting equal rights did not affect the question of moral equality and certainly was not his default position as is the case in international law. Consequently, Coates's authority requirement, through grounding it in positive international rather than natural law, is very much at odds with the classical just war in this respect.

The first aspect in which Steinhoff is incorrect is when he criticises Coates on the issue of war as only to take place between legitimate authorities (2007, 7). In contrast to what Steinhoff suggests, Coates is right that the classical just war as represented by the thinking of St Thomas held that war, *bellum*, could only be waged between sovereign authorities, that is, between sovereign temporal rulers. The reason for that was exactly the concern of reining in the widespread use of violence by various types of actors at the time. The classical just war is simply fundamentally at odds with the revisionist/cosmopolitan take that any individual has the right to wage war. Unsurprisingly, given Steinhoff's wrong reading of history, he does not provide a single counter-example from within the classical just war.

The next issue of contention Steinhoff detects, likewise, misses the point. The first of Coates's ostensible "double standards" (2007, 8) is that Coates seems to suggest that the indiscriminate killing carried out by individuals constitutes terrorism while the same type of killing by the state as legitimate authority does not. Steinhoff

objects to this linguistic double standard. Historically speaking, however, the word “terrorism” entered the English language from the French only after the French Revolution in the late 18<sup>th</sup> century. For St Thomas, such violence carried out by individuals would have come under the Latin term of *rixa* (brawling), “a use of force to effect private vengeance or to secure other unjustifiable ends, in the absence of authorization from legitimate authority, or in a manner disproportionate to the initial offense” (Reichberg 2017, 270-271). While St Thomas held that sovereign authorities could not undertake *rixa*, this did by no means mean that a sovereign’s *bellum* could not be unjust.

Thus, Steinhoff’s scenario of “state terrorism,” namely the indiscriminate killing of Palestinians by Israeli forces, would doubtlessly be an unjust war for classical just war thinkers. For the classical just war, the emphasis was on limiting unjust employments of force. Distinguishing between public and private uses of force was considered to be essential in this regard. That is why Coates does not want to label unjust actions by sovereign authorities, such as the one referenced by Steinhoff, as terrorism. For critics this may amount to a linguistic double standard, but it certainly is no moral double standard.

Steinhoff continues his critique by questioning that the legitimate authority criterion is “logically prior” (2007, 8). He suggests that such an interpretation would amount to an “enabling act” (2007, 8) for sovereign authorities. He provides a drastic example in which a sovereign authority could justly declare children to be legitimate targets. However, contrarily to what he seems to suggest, logically prior does not mean that sovereign authority is the only criterion that must be met for a war to be just. St Thomas, as does Coates, held that for a war to be just, the criteria of just cause and right intention also had to be met. Killing the innocent, as in the example Steinhoff suggests, would be the prototypical unjust war for classical just war thinkers.



In addition, the assertion that an attack on a representative of the legitimate authority such as a policeman is more reprehensible than an attack on an unarmed civilian is vehemently rejected by Steinhoff (2007, 9). Upon an unbiased look, the reason for this argument is not, as Steinhoff suggests, the result of poor moral intuitions but flows directly from the main disagreement between collectivists and individualists. The classical just war allocates a special moral value to the political community as the enabler of a flourishing life. Attacking this institution thus amounts to an attack on civilised life itself, leading to the argument that killing a representative of the authority is morally worse than killing an innocent bystander. For the sake of clarity, one may add that the classical just war would always, without question, consider the killing of an innocent person, whether or not a representative of the political community, unjust.

Next, Steinhoff (2007, 9) turns against Coates's (2016, 141) argument that "the public monopoly of the use of force remains a fundamental step in any process of pacification, and securing that monopoly is a precondition of civilized society." Steinhoff holds that the key aspect in Coates's assertion is the meaning of the word "civilized." He argues that if democracy is meant by civilised, then "*breaking* this monopoly of violence is a historical and, under most circumstances even today, (...) indispensable precondition" (2007, 9). Once again, there seems to be no contradiction here. As both Coates and the classical just war as represented in the thought of St Thomas hold, the public monopoly of force is not unconditional but bound to the precepts of natural law. That is why Aquinas confirms the right of resistance against unjust rule. In order to rule justly, the sovereign would have to work for the common good of his political community. If the sovereign violates this duty, a right to resistance arises which has been subject to extensive debate within the classical just war literature. Likewise, although the state is a natural result of humankind's social nature its establishment might nonetheless require the use of force as the state comes into existence through the work of human hands.

An instance where Steinhoff clearly misinterprets the classical just war is his interpretation of sovereignty. Elaborating on Coates who regrets that the classical authority criterion has become subordinated to the modern concept of state sovereignty built around the principles of political sovereignty and territorial integrity Steinhoff (2007, 11) argues: “According to Coates, the principle in its earlier and traditional form was far more demanding – which is incorrect, as in fact medieval theorists for the most part subsumed legitimate authority to the sovereignty of the ruler.” Unfortunately, however, it is in fact Steinhoff whose history is mistaken. For thinkers like St Thomas there was no such thing as inviolable sovereignty. Any ruler was bound by natural law and, in case the ruler broke it in a grave enough manner, other rulers were justified in taking measures against that ruler. When Coates thus argues that the old authority criterion was more demanding he refers to the duty of the ruler to obey the natural law, an obligation from which his territorial borders could provide no exception.

#### **4.5.2 General Revisionist/Cosmopolitan Objections against Sovereign Authority**

Instead of attempting a lengthy rebuttal, the following section points out why a collectivist moral approach will continue to insist on the moral purchase of the authority criterion. While Steinhoff argues that every individual has the authority to wage war, Reitberger does not embrace this view. However, he argues that the criterion of “legitimate authority” as it was, for example, employed by St Thomas is ethically indefensible. “When we regard legitimate authority as a deontological requirement, however, defensive wars could be unjust if they are fought by the wrong type of actor, lacking proper authorization, such as individuals or self-organized collectives of individuals. And this is unreasonable” (2013, 72). Reitberger (2013, 73) builds his argument around the thinking of McMahan and concludes that “the right to self-defense appears to be independent of the *number* of attackers as well as their

form of political *organization*.” The problem with the authority criterion, according to Reitberger, is that it insists that at some point a group of individuals loses its right to self-defence because they do not resemble a recognised authority. Thus, “A cut-off point must be established between individuals defending themselves together (which would presumably still be justified) and groups waging unjust war because they fail to live up to the LAR. Unless such a cut-off-point can be established it seems illogical to insist upon legitimate authority in cases of self-defense unless one is willing to deny or restrict the right of individuals to defend themselves in the first place, singly or jointly” (2013, 73).

In response, the ostensible problem of finding a “cut-off point” is of no concern for the classical just war as it resides with the individual. The classical just war holds that every individual has the right to self-defence. One may use lethal force, if proportionate, on the spot in order to prevent an attack on one’s life. Importantly, in such an instance the defender would not wage “war,” but rather act in “defence.” It goes without saying that, in case the violence took place in a group setting, people nearby would not have to stand idly by. Quite the contrary, in line with the demand of love of neighbour, such persons would be morally obliged to assist the victim in his or her act of self-defence. Importantly, such an act of “group violence” would, likewise, not be an act of “war.” Here, discussion touches again on the crucial distinction of the classical just war that only the sovereign authority may wage war. For the classical just war there is no point at which a group of individuals loses its right to self-defence because it never had such a right in the first place. Only individuals may use force in individual self-defence; collective self-defence, one of the three just causes for war, falls within the sole authority of the sovereign.

Having resolved the important “war or no war” issue, a further critique Reitberger (2013, 78) puts forward is directed against the classical idea that the authority criterion was a pre-requisite of promoting peace in that it banned the use of

private warfare. Objecting to an unlimited authority criterion he (2013, 79) argues “However, it is clear that this argument must have limits – pacification does not require complete monopolization of force, and monopolization does not override basic rights. Virtually all societies recognize a right for individuals to defend themselves, with lethal force if necessary, suggesting that the monopoly is conditional.” In response, it is unclear what exactly Reitberger is criticising here as St Thomas supported the right of individual self-defence. Furthermore, classical thinkers acknowledged that in case of grave violations of the natural law by the ruler a right of resistance would arise. The “monopolisation” was thus always limited. Importantly, it was limited both from the inside and the outside. In cases of grave violations of the natural law there would not only be a right to resistance domestically but also a duty of neighbouring princes to intervene from the outside.

Next, Reitberger (2013, 80) turns against the classical argument that the authority criterion provided the “possibility of arbitration” which thus made the private resort to force unnecessary. He flatly rejects this view as “flawed” (2013, 80-81): “It is an open question whether the legal channels (when they exist) actually *do* provide a possibility of arbitration and redress for citizens. The argument assumes that the legal channels are responsive to citizens’ rights, needs and entitlements and capable of effectively protecting them, and judging from historical as well as present experience it cannot be taken for granted that the legal authorities actually provide redress for injured parties.”

Underlying Reitberger’s very critical view of authority here seems to be his individualist moral starting point. The classical just war simply had a much more positive view of sovereign authority as making a major contribution to the common good. Of course, Aquinas was not naïve and recognised that authority was always subject to abuse. Such abuse, however, was the result of a violation of the natural law. That is why he was so insistent on his virtue ethics approach which would enable the

individual to meet the demands of natural law in order to lead a flourishing life. The same basic difference between an individualist and collectivist outlook underlies Reitberger's (2013, 81- 83) opposition to the classical understanding of war as law enforcement. "If proper law enforcement and protection is available, it is obvious that we should let the responsible authorities fight wars on behalf of society, for the same reason that we should preferentially let the police catch thieves – they are hopefully best suited for the job. But if the authorities cannot or would not enforce the law, or the laws that are enforced violate basic human rights, there is no valid reason to insist that only the authorities have the right to wage war in defense of such rights" (2013, 82).

Reitberger continues his attempt to contradict the authority criterion with discussions of the remaining issues on his list cited above. Due to space concerns the discussion does not consider these additional but minor concerns, concluding that the single most fundamental reason behind the contemporary rejection of the authority criterion is a matter of perspective. In line with the precepts of liberal political philosophy generally revisionist/cosmopolitan just war thinkers start from an individualist point of view which is necessarily at odds with the collectivist outlook of thinkers who stress the importance of sovereign authority.

## **4.6 The Authority to Conduct Targeted Killings**

This final section assesses in which respects the classical just war understanding of sovereign authority can be helpful in finding an ethically defensible answer to small-scale uses of force. Importantly, in contrast to the Walzerian just war, it is not positive international law but natural law which functions as the baseline of argument. While this argument about the morality of targeted killings has a common starting point with Walzerians in collectivism its main concern is the morality of war, not a space in-

between the morality and legality of war. Thus, in a sense, the classical just war is closer to the “deep morality of war” of revisionists. However, making such an argument does in no way deny that the legal regulation of war has moral value. Following St Thomas, what is right (*ius*) does not necessarily define human law (*lex*) in every detail.

In addition, the demise of the classical understanding of sovereign authority was the result of several aspects one of which was the concern to draft laws which would reduce the occurrence and violence of war. After all, as Johnson (2014, 137-138) emphasises, the classical understanding of sovereignty was not abandoned without reasons and one should keep in mind Hehir’s warning (1992, 255) that “The wisdom of Westphalia should not be too quickly dismissed.” However, it is also true that, as Johnson argues, something was lost when the modern understanding of sovereignty was established. The task of recovering parts of what has been lost without giving up the positive changes the new understanding of sovereignty contributed is thus a delicate one.

Fortunately, the task that must be undertaken with regard to small-scale force is not without precedent. Arguably, the contemporary debate about a “duty to protect” seeks to recover parts of the classical understanding that rulers could not hide behind their borders when they blatantly violated the natural law and it was the responsibility of that ruler’s peers to stop those violations. Johnson (2014, 137-154), in his analysis of the “R2P” debate, emphasises the “dilemma” (2014, 142) of the legalist paradigm “posed in the state of the law of the time: on the one hand, a body of international agreements of various sorts and levels of authority seeking to identify human rights and provide for their protection against violation; on the other hand, a prohibition against the use of armed force by states except in defense against ‘armed attack,’ which had been a principle of international law since the adoption of the United Nations Charter in 1945.”

In line with the classical understanding of war as a legal proceeding this section seeks to recover parts of the classical understanding of sovereign authority for the regulation of targeted killings. Importantly, the argument it makes is no call to completely abandon the modern understanding of sovereignty with its limitation of just cause to self-defence. Rather, this section calls for a limited return to classical sovereign authority with regard to the contemporary threat posed by non-state terrorist actors. Subdivided into a discussion of external and internal authority the section discusses the moral issues associated with the increase in small-scale force which the introductory chapter identified. With regard to external matters, the argument will be made that cases in which terrorists plot or hide in a country whose government is unwilling or unable to prosecute them constitute a violation of natural law, a just cause that may be grave enough to warrant a targeted killing.

Relatedly, because terrorists are no sovereign authority they do not enjoy moral equality. If the criteria of just cause and right intention are met they can be prosecuted, “brought to justice,” by a sovereign authority. Regarding internal authority, two particular issues will be discussed. Firstly, the problem of transparency which has arisen as a result of the secrecy behind the Obama administration’s programme of targeted killing. Secondly, and related to the first issue, the division of labour between the military and the CIA in carrying out targeted killings with apparently different rules of conduct for each governmental branch (see chapter 5 for case-based illustrations).

To begin with, one particular challenge that must be addressed is that “of de-territorialised, transnational terrorism that appeals to a political agenda that sits uneasily within a Westphalian conception of the role of territory” (Williams 2006, 133). The problem that arises in cases such as those presented in this thesis is that at times terrorists seek to escape justice by hiding in third countries. Such hiding was clearly the case with Osama bin Laden (see 5.5) and Anwar al-Awlaki (see 5.6). Both

these individuals hid in Pakistan and Yemen respectively in order to escape justice and, depending on one's source, to plot further crimes. In these two cases, there was a somewhat inconclusive picture as to why the sovereigns of the countries in which the terrorists hid did not bring them to justice themselves. The bin Laden case is the most interesting in this regard as some argue the Pakistani government had no knowledge about bin Laden's whereabouts while the Hersh account goes as far as to argue that bin Laden was somehow protected by Islamabad. What seems indisputable, however, is that, in both cases, the sovereign was either "unable or unwilling" to carry out its task, namely to ensure a state of justice.

In the face of this failure, it seems reasonable to argue that the government which had been wronged, the United States, did not have to stand idly by and accept a continuing state of injustice which the two terrorists' hiding constituted. From a Thomistic perspective, given such circumstances, the US did have the authority to bring them to justice. Arguing this way, the conundrum Walzer (see, e.g., 2016) identifies when he speaks of parts of the "war on terror" as lying somewhere in-between law enforcement and war, the notion that led him to first think about the concept of *jus ad vim*, can be resolved. The practice of targeted killing is law enforcement *through* war; its function parallels a legal proceeding whose objective is the re-establishment of a state of justice. Importantly, this does not mean that bin Laden and al-Awlaki were liable to be killed without further consideration. Before arriving at such a conclusion the criteria of just cause and right intention must be considered also. The argument made here is solely that, due to the failure of the sovereign in whose territory the terrorists hide, the sovereign who suffered from an injustice by those terrorists has the general authority to bring them to justice, to wage war against them.

Arguing that one particular country may have such authority does not, furthermore, reject positions which favour collective responses to terrorist action such



as allocating this authority to the United Nations. After all, as Midgley (1975, 20) notes, St Thomas does not rule out a progressive development of international society. However, as long as such supranational authority has not been established or has proven to be ineffective, as has arguably been the case with the UN system, the right to punish terrorists should reside with the afflicted states. Recent attempts to, for example, regulate drone warfare through an international regime (see, e.g., Buchanan and Keohane 2015) are thus broadly in line with a Thomistic take on such uses of violence.

Given the position pronounced so far, the moral argument about authority and targeted killing has thus curious parallels with the “unable or unwilling” standard put forward by all US administrations since the terrorist attacks of 9/11 which Heinze (2011, 1080) refers to as a “regime of non-state responsibility.” One thus encounters in this argument a morally praiseworthy “renegotiation” of the just war tradition in classical just war terms which is not subject to the Westphalian principles. At the same time, however, arguing that one of the most controversial aspects of the “war on terror” is in fact morally defensible does not mean that the remaining just war criteria of just cause and right intention have been applied correctly. As a result, one may conclude that the warnings against a potential “everywhere war” (Gregory 2011) do not deny the moral authority to take action against the oftentimes borderless threat of Islamist terrorism.

Having argued that territorial borders must not function as a tool of protecting injustice, however, should not be understood as denying the moral value of borders per se. After all, as argued above, the classical understanding of sovereignty which was replaced by Westphalian sovereignty did not come without moral justification. As Williams (2006, 130) notes:

The strongest defence of the Westphalian border lies in its role in the nexus of rules and norms of interstate behaviour that aim to restrain the uses of violence in international relations. (...) The fear of abuse of relaxed rules by the powerful to pursue

expansionary or hegemonic wars; the fear of the opening of 'domestic' politics to violent intrusion by outsiders allowing cultural and religious divisions contained within the Westphalian structure to once again be a *casus belli*; the fear of a slippery slope to the Hobbesian abyss of the war of all against all motivates this defence.

However, the fears listed by Williams are prudential concerns, not deontological ones. In order to avoid the slippery slope he identifies, the argument made here comes with a call for employing a considerable amount of prudence. In line with the general pedigree of the Christian just war tradition as being a tradition focusing on the "dual theme" (Johnson 1984, 2) of permission and restraint the argument made here only applies to the limited use of force. The argument does not extend to large-scale, state-against-state, warfare. The lesson that history teaches is to limit the potential ignoring of territorial borders to the war against unjust culpable non-state actors. While there might be exceptions for "traditional" war as well, such as in the case of humanitarian intervention, engaging with those questions is beyond the scope of this thesis.

The question of how the concept of moral symmetry applies to the practice of targeted killing can be resolved quickly. For the Thomistic just war, modern-day terrorists cannot be the moral equals of the soldiers who, representing a sovereign authority, fight them. In addition, they cannot be exonerated of their personal culpability as might be the case for legitimate soldiers fighting on the unjust side and should thus not be granted equal rights. The reason for this is simply that terrorist violence always resembles an illicit private use of force, not war. The framework governing targeted killings should thus adopt the classical understanding of belligerency in which "the legal effects of a just war were viewed as benefiting the just belligerent only. The unjust adversary, by contrast, was not even properly speaking a belligerent; rather he was deemed the rebellious object of armed enforcement action and in this respect was likened to a criminal resisting arrest" (Reichberg 2013, 182). In consequence, the potentially problematic asymmetric operator-target relationship the introductory chapter identified as discussed in the literature review turns out to be no moral concern for the policy of targeted killing.

With regard to the domestic aspect of targeted killing this thesis does not follow Aquinas by the word. As pointed out above, there has been much debate about St Thomas's preferences regarding the ideal type of government, but he certainly was no democrat in today's understanding of the term. This thesis takes for granted that representative democracy is the best type of government. Importantly, making this argument does not affect the natural law argument as to how government comes into existence and what its purpose is, namely to contribute to the common good. Adopting a natural law position also means that the role of the moralist is, as Johnson emphasises, of a more modest kind. Putting significant trust in those in authority, the moralist seeks to offer advice. The final decision, however, the moralist is willing to accept, resides with decision-makers.

One common aspect of small-scale employments of force is that they are subject to government secrecy. For example, if there was no such secrecy, at least one account of the bin Laden raid could easily be falsified. Moreover, in cases such as al-Majalah (see 5.3), the US still has not acknowledged its role in carrying out the strike. On a different level, there has been much debate about the decision-making process leading up to targeted killings. Talk about secret "Terror Tuesday" meetings in the White House and obviously different rules of engagement for the military and the CIA in carrying out targeted killings caught the public eye. Furthermore, it seems unclear whether the president as commander-in-chief, as well as his subordinates, was sufficiently checked in his decisions and whether, in case of failure, was sufficiently held accountable.

In what follows, instead of drafting precise rules for how the authority to conduct acts of targeted killings should be regulated the thesis reflects on what St Thomas had to say about authority and, then, draws conclusions. As pointed out above, Aquinas stressed man's political nature which required him to live in society. One of the most important aspects in this regard was man's ability to speak which sets

him apart from other animals. The ability to speak enables man to enter into dialogue and consequently advance the common good. Government, although instituted by God and necessarily somewhat removed from the society at large, must nonetheless give voice and listen to the community whose care it has been entrusted with. With regard to small-scale force, it seems that the Obama administration did not sufficiently engage in dialogue with the American people. Naturally, decision-makers must withhold information from the public that would otherwise endanger vital operations. However, there is a price for excessive secrecy such as arguably was the case in operations such as the bin Laden raid and the al-Majalah bombing, namely that the public's trust in its government suffers. Kelsay (2013, 83) points to a tension between the justified withholding of information and excessive secrecy: "Officials who say that their presentation of evidence must be restricted for security reasons have a point, but it only goes so far."

In response to this tension, it seems reasonable to argue that when a state carries out targeted killings it, at least retrospectively, must acknowledge its hand in the operation. For if the reason for secrecy is to cover up an act of injustice, the government violates the natural law. In addition, there should be some sort of accountability mechanism which checks retrospectively whether the employment of lethal force was justified. Walzer (2016, 17-18) has suggested such a mechanism which would arguably contribute to government's legitimacy in taking such decisions.

All this suggests how important it is to open up the process by which lists of targets are put together and decisions about drone attacks are made. It can't be right that a couple of people appointed by the president, with the president looking on, make these decisions entirely on their own. Particular decisions about particular targets will always be made by a small group, but these decisions should be subject to periodic review by a larger number of people inside the government but independent of the president's office (and of the CIA). The general criteria for selecting targets (...) should also be considered and debated not only inside but also outside the government, by the body of citizens, by all of us. I don't object to these killings because they are "extrajudicial"; my argument here refers only to dangerous enemies who can't be captured and brought to trial. But I do want their deaths to be the subject of ongoing

political and moral arguments, and there should be known government officials accountable to the rest of us for attacks that go badly wrong.

Finally, from a Thomistic perspective, the much debated “division of labour” between the military and the CIA in carrying out targeted killings is not morally problematic as such. In cases when targeted killings are justified, government has the authority to undertake them. Who carries out this task is a secondary question; there seems to be no decreasing moral value in the action only because the CIA, or JSOC, carries out such action. Having said that, however, it does indeed make a moral difference if one actor or the other is given the authority to strike in order to evade public accountability. As the cases chapter will illustrate, there seems to have been an attempt by the Obama administration to use the different legislation governing the conduct of the CIA and JSOC to ensure the most possible secrecy. If such secrecy is used in order to hide the US’s involvement in unjust conduct such behaviour is ethically indefensible. Furthermore, although there is no problem with two government agencies carrying out such action as such, it does make a difference if they are subject to different rules, some of which violate the natural law. For example, regarding the issue of so-called signature strikes, it seems that different rules apply to the CIA and the military. Signature strikes, from a natural law perspective, are inherently unjust as the identities of those who are targeted are unclear and thus no moral culpability has been determined. It is unjust if one actor, presumably the one which can act in the most secretive fashion, is given the permission to blatantly violate the natural law.

## **Conclusion**

This chapter, based on textual assessment and logic, has demonstrated that underlying the chasm between classical and Walzerian just war approaches on the one hand and revisionists on the other is a major philosophical disagreement. While the

former approaches allocate special moral value to the political community, most revisionists have an entirely different starting point, namely individual morality. It is this major disagreement that underlies the different understandings of the authority criterion. At the same time, the chapter has demonstrated that despite the commonality just pointed out between Walzerians and the classical just war, the latter had a very different understanding of sovereign authority compared to both the Walzerian and revisionist just wars. In particular, classical thinkers did not limit just war to the only just cause of self-defence and they, consequently, did not embrace the Westphalian standards of political sovereignty and territorial integrity. The chapter concluded by arguing for a limited recapture of the classical understanding of sovereign authority based on Thomistic natural law philosophy with regard to targeted killing, providing some insights into how such uses of violence should be regulated both externally and internally.

# 5 The Cases

## Introduction

Preparing the ground for the second stage of this thesis's argument with regard to small-scale force, the chapter on liability, this chapter provides eight detailed cases of small-scale employments of force carried out by the Obama administration. While the first post-9/11 targeted killings were authorised by the Bush administration, the practice only moved to the centre of attention during the presidency of Barack Obama. Before starting with the presentation of cases, it makes sense to provide a general summary of the Obama administration's decision-making process leading up to the employment of such force. McNeal (2014, 728-729) provides the following digest of the approval process behind the so-called kill list:

First, military and intelligence officials from various agencies compile data and make recommendations based on internal vetting and validation standards. Second, those recommendations go through the NCTC [National Counterterrorism Center], which further vets and validates rosters of names and other variables that are further tailored to meet White House standards for lethal targeting. Third, the President's designee (currently the counterterrorism adviser) convenes an NSC [National Security Council] deputies meeting to get input from senior officials, including top lawyers from the appropriate agencies and departments, such as the CIA, FBI, DOD, State Department, and NCTC. At this step is where the State Department's Legal Adviser (...) and the Department of Defense General Counsel (...), along with other top lawyers, would have an opportunity to weigh in with legal opinions on behalf of their respective departments. Objections to a strike from top lawyers might prevent the decision from climbing further up the ladder absent more deliberation. In practice, an objection from one of these key attorneys almost certainly causes the President's designee in the NSC process to hesitate before seeking final approval from the President. Finally, if the NSC gives approval, the President's counterterrorism advisor shapes the product of the NSC's deliberations and seeks final approval from the President.

This general process should be kept in mind when considering the cases presented in this chapter. At times, it is impossible to identify the individual steps pointed out by McNeal as there is no knowledge of the exact deliberations leading up to a targeted killing. It must also be noted that the administration's decision-making process

evolved over Obama's two terms in office and might not yet have been employed as described by McNeal in some of the cases.

With regard to case selection, an effort has been made to provide a sufficiently diverse set. The cases considered took place in three different countries and include commando raids, cruise missile strikes, and drone strikes. Moreover, cases are listed in chronological order, not in terms of decreasing moral certitude. For the ease of reading, the cases are grouped together in a single chapter. Instead of presenting detailed discussions of circumstances within the actual casuistical analysis, the reader is asked to refer back to the cases chapter in order to appreciate the cases' complexity.

## **5.1 The Yamamoto Paradigm**

Finding a paradigm for targeted killing requires to go beyond the war against Al Qaeda and associated forces. Leaving recent operations aside, the paradigm case can be found in the very first known wartime targeted killing the US carried out, namely the killing of Japanese Admiral Isoroku Yamamoto during the Second World War. This case's resolution, arguably universally accepted as morally appropriate, seems to underpin the reasoning of the Walzerian legalist paradigm and, at least partly, the revisionist just war, too. In addition, the Obama administration itself invoked the Yamamoto case as precedent for its policy of targeted killing (see, e.g., Holder 2012), an assertion that triggered clashing opinions (see, e.g., Goldsmith 2011a, b; Heller 2011).

The targeted killing of Admiral Yamamoto took place on April 18, 1943 next to the island of Bougainville in the South Pacific. Eighteen P-38 aircraft were launched from Henderson Field, Guadalcanal and intercepted the admiral's bomber aircraft, shooting it down. The mission evolved in the wake of a single week; it was a "real-time decision," meaning that there had been no pre-existing policy of specifically targeting



an individual (Arvanitakis 2015, 7). On April 13, US intelligence had intercepted secret Japanese communication which spelled out the minutiae of a planned troop inspection by the admiral close to the front line which would bring him within reach of US fighter aircraft. Since the 1920s, the US had been able to access secret Japanese communication, contributing to its victories in the Battle of Midway and Guadalcanal (Frank 1990, 38). After completely deciphering the message, its contents were presented to Admiral Chester A. Nimitz, the Commander in Chief of the Pacific Ocean Areas, as well as to the political leadership in Washington (Davis 2005, 227). Although there is no definitive account of the Yamamoto mission, Arvanitakis (2015, 8) points to “an adjudication process at the highest levels of command” which may even, more or less directly, have involved President Roosevelt.

The military decision-making process seems to have been influenced, first and foremost, by considerations of utility, not morality (Davis 2005, 228-229). As Davis (1969, 7) quotes one participant of the deliberation process: “Assuming that we have planes able to intercept him – it would have to be planes – you should first consider, I suppose, what would be gained by killing him.” Interestingly, punitive thinking played an important role in this regard: “(...) Yamamoto was now their implacable enemy, the man who had launched the sneak attack on Pearl Harbor and had not willingly yielded an inch since then. From Hawaii to the Philippines to Java to Australia to the Solomon Islands, the blood of thousands of American and Allied soldiers, sailors, and airmen had been spilled because of Yamamoto, and here was an opportunity to eliminate him” (Davis 2005, 228). The aspect of self-defence as legitimate just cause to kill Yamamoto, although present, seems to have been subordinate to the retributive cause. The self-defence rationale shines through briefly in Davis’s account of Nimitz’s thinking: “Yamamoto was the beating heart of the Japanese navy. In his own country, he was seen as embodying the unwavering Bushido fighting spirit (2005, 228). (...) Layton and Nimitz also discussed the possibility that a successor to Yamamoto might present an even more formidable foe;

they concluded that the Japanese navy had no comparable leader of strategic vision, stature, and daring. He was, without a doubt, *the* leader, the man who made that huge fleet work” (2005, 229). This invocation of self-defence, however, is immediately followed by another punitive rationale, namely that of revenge (2005, 228-229): “In the United States, however, he was the hated face of the Japanese war machine. Americans still believed the small admiral arrogantly planned to dictate peace terms in the White House. Killing him would be a horrific setback for Japan, and, for America, payback for Pearl Harbor.” Revenge also featured prominently when Nimitz approved the mission: “This would be [sic] biggest mission any of them had ever flown, for if they knocked Yamamoto out of the war, it would be both a stunning military victory for the Americans and horrendous setback for the Japanese. They were being assigned to a mission of ultimate revenge, to settle accounts for all the maiming, misery, and blood that had been spilled in the South Pacific” (2005, 237). It is unsurprising that the targeted killing of Admiral Yamamoto is commonly known as “Operation Vengeance” although there is no official US record of such a mission (Arvanitakis 2015, 42).

As to the question whether Yamamoto should specifically be targeted, there was considerable doubt whether the admiral’s killing would make a positive contribution to winning the war in the Pacific (2015, 4-5). Among the greatest concerns was the fear that the Japanese would figure out that their codes had been deciphered and would subsequently change them. The question was thus whether taking out Yamamoto was worth a gamble which might result in losing a major strategic asset (Davis 2005, 229). Eventually, this issue was resolved with the help of a cover story which gave credit to Australian coastwatchers to have intercepted the message (2005, 237). Moreover, another major concern was Yamamoto himself who was considered to be a possible “key to stopping the war” (2005, 229). The admiral had been against going to war with the US and had a high personal reputation both with the Japanese emperor and the Japanese people. If he gave up his uniform and

joined the War Cabinet, some argued, he could become a key voice within government to push for a peace settlement (2005, 229). Davis (2005, 289-290) succinctly summarises these concerns as follows:

There was also a faction that desperately wanted Isokuru Yamamoto to *live*, not die. (...) the war cabinet in Tokyo, headed by Premier Tojo and his powerful army supporters, would never admit the war was lost. Yamamoto was the only person who stood any chance of challenging them. Not only did the admiral have a close relationship with Emperor Hirohito, he was an acknowledged naval hero and was idolized by the common man. His dominant personality, and his loyalty to his men inspired people to follow him, and military victories had only increased his stature. The intelligence sources argued that Yamamoto might someday have been able to lead Japan away from the war with America that he had started but never truly wanted.

Another relevant concern in the deliberations was his possible succession. Davis (1969, 8) quotes Nimitz as having said that “The only thing that concerns me is whether they could find a more effective fleet commander.” For the US, Yamamoto resembled a military commander who had been in leading positions for many years and to whose operational style it had grown used. At the time of the deliberations, Yamamoto was thought to have been convinced that victory for the Japanese navy was already beyond reach (Agawa 1979, 345). The concern was that Yamamoto’s successor might pursue different strategies, potentially bringing a new dynamic to the war in the Pacific which recently had been developing well for the US. In addition, there was uncertainty about the reaction of the Japanese people. On the one hand, there were those who argued that killing Yamamoto would be a blow to the morale of both the Japanese armed forces and the Japanese people while, at the same time, it would provide a boost for US forces. On the other, there was the fear that, instead of weakening the resolve of the Japanese, Yamamoto’s death might as well lead to the contrary. During the deliberations, however, the conclusion was made that new Japanese offensives due to anger caused by the killing Yamamoto were unlikely as Japanese forces were strained already (Davis 1969, 8). Despite all of these concerns,

Admiral Nimitz authorised the targeted killing on April 17, making clear that he would take responsibility for the risks involved in the mission (Davis 2005, 229).

With regard to the political deliberations, one noteworthy aspect of the thought process of Secretary Knox was that he seems to have been concerned about the legality as well as the morality of singling out an individual for targeted killing. That is why he ordered a legal report on the matter which concluded that “since the Japanese had bombed Pearl Harbor and the Philippines in sneak attacks, without a declaration of war, they were outlaws among nations, and had forfeited the protection of international law” (Davis 1969, 19). In addition, Knox insisted on a list of historical precedents for killing enemy leaders during war (1969, 19). As far as President Roosevelt’s involvement is concerned, there can be no ultimate conclusion as there are, again, no official records of a direct contact between the commander in chief and his Navy secretary between April 13 and 18 while the president was travelling within the US (Arvanitakis 2015, 17). However, Davis (1969, 16) claims the two had been in contact concerning the Yamamoto decision but their communication was “deliberately omitted from the record.” According to Davis’s account (1969, 17), Roosevelt was briefed about the planned raid by Admiral William Mott. “Mott sent word of the Yamamoto mission to the train, though so far as he knew, FDR took no active part in the decision. ‘He left such things with the military,’ Mott said. As a matter of fact, an order invoking the President’s authority was being prepared for dispatch to the South Pacific. The order was signed by Frank Knox.”

As far as the planning of the mission was concerned, the first option considered was not to shoot down the admiral’s aircraft. According to the intercepted message, Yamamoto would land on Ballale Island and do a first inspection before boarding a subchaser and going to a base at Buin. The initial plan was to hit the admiral whilst on the boat (Davis 2005, 232). As it turned out, however, the “true determining factor of the mission” (2005, 232) was the distance of about 450 miles

between Guadalcanal and Bougainville; neither the navy nor the marines had aircraft at their disposal capable of flying such a mission. The only aircraft available that, equipped with additional fuel tanks, would be able to conduct this mission was the P-38, which, however, belonged to the army (2005, 232). That is why the army was asked to join the mission planning whereas prior deliberations were restricted to navy and marines only. During the deliberations the navy pushed for its plan to attack the subchaser but the army won the debate arguing for attacking Yamamoto mid-air (2005, 237-239).

With regard to mission planning, the US faced logistical problems. It was estimated that, even with the extra tanks, the pilots would only have ten minutes of fuel left at the point of interception. As a result, in case the Japanese side was early or late, the mission to kill Yamamoto would inevitably fail (Arvanitakis 2015, 26). During the first four segments of the flight, the eighteen aircraft would fly at wave top level in order not to be detected by Japanese radar. For the last segment, the aircraft would separate into two groups. The four “hunters” would attack the bombers, in one of which Yamamoto would be, from an altitude of 2,000 feet while the others would climb to 10,000 feet to provide top cover and fight any Japanese escort aircraft. Generally speaking, the mission plan was “written in extreme detail,” providing each pilot with his exact responsibilities, leaving “no room for interpretation” (2015, 27). Up until the engagement of the Japanese, the pilots adhered to strict radio silence (2015, 30). Admiral Yamamoto’s convoy was made up of two “Betty” bombers and six “Zero” aircraft. Only a few minutes after the start, the US side lost two aircraft due to technical problems, reducing the overall number to sixteen (2015, 29). Apart from this initial mishap, the flight just above sea level was uneventful and, at the estimated time, the fighters started to climb to the assigned altitude. In line with the mission plan, shortly after the pilots spotted the Japanese convoy, they discarded the additional fuel tanks in order to improve manoeuvrability, and started to engage the enemy (2015, 30). However, due to the fact that one “hunter” could not initially discard his fuel tank

and was thus in need of protection, the actual number of aircraft attacking Yamamoto's bomber was reduced to two. These two successfully attacked Yamamoto's bomber. It crashed into the jungle, killing all passengers. The actual fighting lasted less than two minutes and once it was over, fifteen US aircraft returned to base, only one had been lost in the fighting (2015, 33). Of the escorting Zeros, none were shot down (Glines 1991, x).

### **5.1.1 Implications for Targeted Killing**

The Yamamoto operation arguably set a precedent for the war time killing of military leaders as the mission

(...) became a classic air action in the annals of the U.S. Air Force. (...) It may not seem of any real consequence today who actually fired the shots that downed an enemy bomber. What is important is that the mission was planned and carried out in the finest tradition of the U.S. Air Force. The anonymous cryptographers who decoded the enemy messages and learned the admiral's itinerary, the Army Air Force squadron commander who planned the interception, and the pilots who participated in it deserve prominent mention in the World War II military aviation history books. (Glines 1991, x-xi)

In the US, at the time, the news that Yamamoto had been killed was welcomed as good news from the war in the Pacific. "No tears were shed in America for Yamamoto, for, as the *New York Times* would state, 'He was regarded as perhaps the boldest, most imaginative and – where the United States was concerned – the most unscrupulous of the Japanese offensive fighters. He hated the United States.' Whether or not that last sentence was true, the United States hated him. From Maine to California, Americans were glad he was dead. The fact that he was shot down by American pilots was considered payback for Pearl Harbor" (Davis 2005, 310-311). In addition, Arvanitakis (2015, 41) argues that the killing was of "great strategic value." What Arvanitakis emphasises in particular regarding the strategic nature of the Yamamoto killing is that the admiral "was truly unique, irreplaceable" (2015, 44). He argues that US decision-makers appreciated Yamamoto's value as a target holistically and

evaluated the effect of his demise for both the short term and long term. In addition, the US leadership was “pragmatic in their expectations,” meaning that killing Yamamoto was not expected to bring the war to an end but might make a contribution to ending the conflict nonetheless. As a result, for Arvanitakis (2015, 45), the targeted killing of Yamamoto constitutes the US precedent for this particular practice.

Taking the Yamamoto mission as paradigm for the determination of liability to targeted killing, it is possible to derive several paradigmatic guidelines from the Yamamoto case which seem difficult to maintain regarding the circumstances of today’s targeted killings and thus require casuistical re-assessment. To begin with, the targeted killing of Admiral Yamamoto as a wartime military leader is in line with the precepts of the legalist paradigm of just war. The legalist paradigm distinguishes between the licit wartime targeting of military leaders and the illicit targeting of political leaders (see, e.g., Walzer 2016, 13). As touched upon above, the Obama administration justified the legality of its targeted killing policy by invoking the Yamamoto precedent. In a high-profile speech Attorney General Holder (2012) argued that

Furthermore, it is entirely lawful – under both United States law and applicable law of war principles – to target specific senior operational leaders of al Qaeda and associated forces. This is not a novel concept. In fact, during World War II, the United States tracked the plane flying Admiral Isoroku Yamamoto – the commander of Japanese forces in the attack on Pearl Harbor and the Battle of Midway – and shot it down specifically because he was on board. As I explained to the Senate Judiciary Committee following the operation that killed Osama bin Laden, the same rules apply today.

However, directly targeting military leaders during war was not always considered to be licit. In fact, as pointed out above, the question of historical precedents applicable to the Yamamoto case was an important aspect of the political decision to target him. It remains unclear which precedents were considered but, in 1988, a “Yamamoto Retrospective” was held which considered such questions. One of the speakers, Joseph Dawson, took up one particular historical instance, which might

have been part of the Yamamoto decision, to point out the newness of the Yamamoto case. It is worth quoting from this contribution in length, because if one accepts the Yamamoto case as paradigm one might want to consider other possible solutions. Glines (1991, 159-160) quotes Dawson as follows:

We know some commanders concluded that the chance dangers of combat and service life were enough without intentionally directing fire against enemy commanders. The story of the Duke of Wellington at Waterloo is perhaps the most famous example of *not* firing on an enemy commander, even when the opportunity seemed right. Across the field stood Napoleon Bonaparte with his staff. An alert English artilleryman called out to the Duke:

“There’s Bonaparte, Sir. I think I can reach him. May I fire?”

The Duke was aghast.

No, no. Generals commanding armies have something else to do than shoot at one another.”

Was not firing on Napoleon only a matter of what Wellington, and some other 19<sup>th</sup> century commanders, may have considered “sporting” or “fair” – or something that “was just not done” to a brother general? It was universally admitted that any officer, no matter how high his rank, might die coincidental to combat or campaigning, but here is the prime 19<sup>th</sup> century example of one senior officer who would not order disciplined troops to fire upon the known location of a senior enemy soldier while simultaneously all-out efforts were made to kill or cripple thousands of other enemy soldiers on the same battlefield. (...) Unlike Wellington in 1815, the Americans in 1943 seized the chance to bring down an enemy commander.

As a result, it seems that the Yamamoto precedent, as it broke with the tradition of not targeting military leaders, contributed toward making the wartime targeting of military leaders legally and, for Walzerians, morally, acceptable. More generally, an issue this thesis must address is whether individuals may become liable to targeted killing solely for wearing uniforms or whether, as revisionists argue, they must first forfeit their right not to be harmed. In addition, with regard to the principle of just cause one must ask whether the strict limitation of just cause to self-defence embraced by both Walzerians and revisionists should be maintained. During the Yamamoto Retrospective, another speaker, Paul Woodruff, addressed the ethics behind the Yamamoto killing arguing that both motives of punishment, retribution and vengeance, were present in the decision. However, precisely because in the actual



decision the rationale of self-defence was pre-eminent he concluded that the targeted killing of Yamamoto was morally justified (Glines 1991, 169). It seems that this position has been commonly accepted in contemporary moral debate. Unsurprisingly, the Obama administration, in addition to the armed conflict justification presented above, also referred to the inherent right of self-defence enshrined in international law as rationale behind targeted killing (Brennan 2011). However, as the following cases demonstrate, aspects of punishment such as retribution and perhaps of vengeance, too, seem to have featured in the decision process of recent targeting decisions. It thus must be investigated whether the morality of targeted killing, in contrast to the Yamamoto paradigm as well as both the Walzerian and revisionist just war, should go beyond self-defence and allow for some limited punitive force as well.

## **5.2 The Case of Saleh Ali Saleh Nabhan, Somalia, 14**

### **September, 2009**

The case of Saleh Ali Saleh Nabhan was a “seminal event” for the future development of the Obama administration’s targeted killing programme (Klaidman 2013, 209). Moreover, the targeted killing of Nabhan was the first President Obama authorised in the theatre of Somalia (Scahill 2013, 295). Not only does this particular operation foreground the tension between attempting capture on the one hand and targeted killing on the other, but the case also has implications for a punitive rationale of targeted killing.

As reported by Klaidman (2013, 122-127), the CIA and the military had been following Nabhan’s activities for years. In fact, as Scahill (2013, 226) has it, the Bush administration had previously, on March 2, 2008, carried out an unsuccessful missile strike to kill Nabhan. Now, in August 2009, JSOC had a lead on the man whom it considered to be a “major al-Qaeda terrorist.” Nabhan was considered to be “a senior member of al-Qaeda’s East Africa branch and a critical link between al-Qaeda and its

Somalia-based affiliate, the Shabab” (Klaidman 2013, 122). As Scahill (2013, 226) quotes a Somali terrorism scholar, Nabhan “had become the bridge between al Shabab and al Qaeda, tapping into the resources of al Qaeda, bringing in more foreign fighters, as well as financial resources – more importantly military know-how: How to make explosives, how to train people, and so on.” More specifically, Scahill (2013, 294) writes that US intelligence believed Nabhan “was running three training camps that produced several suicide bombers, including a US citizen.” Peritz and Rosenbach (2012, 203) quote one security analyst who suggested that “Nabhan was a high-enough target within the al-Qaeda organization that his elimination could seriously disrupt the command structure of al-Qaeda in Somalia.”

In addition, he had been associated with several terrorist attacks in East Africa, among them an attack on an Israeli resort in Mombasa and the US embassy bombings in Kenya and Tanzania. With regard to the latter attacks, however, Peritz and Rosenbach (2012, 197) note that US authorities never connected him to those. Scahill (2013, 119) provides further detail, describing the link US authorities identified between Nabhan and the attack on the Mombasa resort as well as a missile attack on an Israeli plane at Mogadishu’s airport on the same day.

In the first strike, three men drove a vehicle laced with explosives into the Paradise Hotel, killing themselves and thirteen others, and wounding eighty more. Minutes later, two men fired surface-to-air missiles at Arkia Israel Airlines Flight 582. Both narrowly missed the plane. Washington suspected that the men who plotted these attacks were part of the same cell that had hit its embassies in 1998. (...) A previously unknown operative, Saleh Ali Saleh Nabhan, came to the attention of US authorities when the car that blew up the Paradise Hotel was traced back to him. The Kenyan citizen of Yemeni descent was also accused of firing one of the rockets. Nabhan had supposedly been managing a Mombasa cell for years, perhaps serving as the principal intermediary between the Kenya cell and al Qaeda leadership in Afghanistan-Pakistan.

Killing Nabhan was considered to be “a major victory in the war on terror,” however, there was debate whether capturing him would be even more effective in the longer run. The assumption was that Nabhan was “a potentially huge intelligence windfall,”

being able to provide the agencies with a better understanding of the relationship between Al Qaeda and its affiliates (Klaidman 2013, 122).

Now, after months of surveillance, US authorities discovered that Nabhan was about “to travel along a remote coastal road in southern Somalia. (...) Nabhan’s convoy would soon be setting out from the capital, Mogadishu, on its way to a meeting of Islamic militants in the coastal town of Baraawe” (2013, 123). This opportunity triggered a deliberation process within the Obama administration about how to act. Klaidman (2013, 123) describes the setting of the decisive meeting as follows:

Early one September evening, more than three dozen officials assembled by secure videoconference to consider options for the sensitive operation. The meeting was chaired by Admiral Mike Mullen, chairman of the Joint Chiefs. After a short introduction, Mullen called on Vice Admiral William H. McRaven, head of the Joint Special Operations Command and one of the military’s most experienced terrorist hunters. Nabhan had been under close surveillance for months. He’d stayed mostly in heavily populated areas, where the risk of casualties, either to civilians or American soldiers, was too great to launch any kind of raid. But now it looked like they had the narrow window of opportunity they had been hoping for.

JSOC suggested three possible options with varying degrees of risk pointing out which equipment would be used and providing estimates about collateral damage. The first and least risky option in terms of potential harm to US soldiers was to fire Tomahawk cruise missiles from a warship off the Somali coast. The downside of such a strike, however, would be that the potential collateral damage was high and there was no certainty that Nabhan would actually be killed (2013, 123-124). The second option was to launch a helicopter-borne assault on Nabhan’s convoy after which the helicopters would briefly land in order to confirm the kill. “There was less chance of error there. Small attack helicopters would allow the commandos to ‘look the target in the eye and make sure it was the right guy’ (...)” (2013, 124). Finally, the military suggested a so-called “snatch and grab” operation, an attempt to capture Nabhan alive. The plan was to carry out a “‘vehicular interdiction.’ Helicopters would swoop in, allowing a sharpshooter to shoot through the engine block of Nabhan’s jeep. The

vehicle would die, helicopters would land, and commandoes would grab Nabhan” (2013, 125). “From a purely tactical standpoint it was the most attractive alternative. Intelligence from high-value targets was the coin of the realm in the terror wars. But it was also the riskiest option, requiring significant boots on the ground” (2013, 124). In addition, there was the problem that the Obama administration had not yet made a decision about how to deal with captured alleged terrorists.

And there was another problem: where would Nabhan be taken if the military succeeded in capturing him? Nine months into its own war on al-Qaeda, the Obama administration had no detention policy for terrorists captured outside established warzones like Afghanistan or Iraq. The CIA was out of the interrogation business, its secret black sites shut down by Obama’s executive order. Moving Nabhan to Guantánamo was out of the question, since the administration’s committed policy was to transfer detainees out of there, not in. The detention facility at the US air base in Bagram, Afghanistan, wouldn’t work either; the White House didn’t want the prison to become the new Guantánamo. Turing him over to the host government, as they might have done in Pakistan or Afghanistan, was also not an option in anarchic Somalia. Finally, bringing Nabhan to the United States for prosecution or prolonged detention was a political nonstarter for the Obama White House. Some weeks earlier, Hoss Cartwright, the vice chairman of the Joint Chiefs, had raised with Obama the conundrum they were facing. He warned the president that the military could not afford to be “trapped in a no-quarters environment.” Obama did not understand the military idiom. Cartwright explained that under the laws of war the military was required to take the target of an operation into custody if he surrendered or was wounded. “We do not have a plausible capture strategy,” Cartwright told the president. (2013, 124-125)

This lack of a detention policy led JSOC to consider detaining Nabhan “on a ship at sea while figuring out what to do with him – ‘pretty much making it up as we went along,’ as one participant put it” (2013, 125).

Klaidman (2013, 125) further reports that among the participants of the meeting there had been an uneasiness about the idea of using ground troops in Somalia due to the October 1993 mission which became known as “Black Hawk Down.” That operation, too, was supposed to capture a Somali warlord and ended with eighteen dead American Army Rangers. Finally, after the deliberations, the

president was presented with a kill and a capture option plus the contingency plan of dropping a 500-pound bomb from a fixed-wing aircraft. That contingency plan, however, would prove to be a theoretical option only due to cloud cover. Klaidman writes that “as everyone left the meeting that evening, it was clear that the only viable plan was the lethal one” (2013, 126), which Obama then approved under the mission name “Operation Celestial Balance.”

The mission was an operative success: “The next morning Somali villagers saw several low-flying attack helicopters emerging over the horizon. Several AH-6 Little Birds, deployed from US naval ships off the Somali coast, approached the convoy, strafing Nabhan’s jeep and another vehicle. Nabhan and three other militants were killed. One of the helicopters landed long enough for a small team of commandos to scoop up some of Nabhan’s remains – the DNA needed to prove he was dead” (2013, 126). Interestingly, Mazzetti (2013, 246-247) adds that while Obama did indeed opt for the lethal option, he had not chosen the helicopter raid. Instead, he had ordered the least risky option of a missile strike. “But things didn’t go as planned. With JSOC making final preparations for the operation, code-named Celestial Balance, the missile-launcher malfunctioned on the plane that had been designated for the mission. With time running out and Nabhan on the move, McRaven ordered that the commandos carry out the fallback plan: The SEALs waiting on a Navy ship off the Somali coast loaded into the helicopters and headed west, into Somali airspace. The helicopters strafed the convoy, killing Nabhan and three al Shabab operatives.”

While the operation was considered to be “a success of a sort” by the administration as Nabhan was killed and Obama received credit for being willing to take the risk of ordering a daylight raid, Klaidman (2013, 126-127) reports that there was uneasiness within the inner circle as to whether the absence of a detention policy had contributed to taking the kill decision.

Rumors swirled through the Pentagon that Nabhan had been killed because the White House didn’t want to face the tangled and politically fraught detention issues. Jeh C.

Johnson, the military's top lawyer, was so concerned, he conducted his own inquiry to satisfy himself that that was not the case. In the end, no direct evidence has ever emerged showing that the decision to pursue a kill over a capture in the Nabhan case was dictated by the lack of a long-term detention policy. Yet participants in the conference call that day realized that over time, the lack of a policy would foreclose important tactical avenues in the war on terror. The inability to detain terror suspects was creating perverse incentives that favored killing or releasing suspected terrorists over capturing them. (2013, 126)

One final aspect the Nabhan case highlights is the tension between the urgency of action as represented by the military and sufficient justification of action as represented by the team of legal advisers. As Klaidman (2013, 202) recalls Harold Koh's [legal adviser of the Department of State] second thoughts about the Nabhan targeted killing.

That night, Koh had slept fitfully. He had lingering doubts about the quality of the intelligence that had been presented, and he was disturbed by his own passivity during the SVTS [secure video teleconference] meeting. The military was a juggernaut. They had overwhelmed the session with their sheer numbers, their impenetrable jargon, and their ability to create an atmosphere of do-or-die urgency. How could anybody, let alone a humanitarian law professor, resist such powerful momentum? Koh was no wallflower when it came to expressing his views; normally he relished battling it out with his bureaucratic rivals. But on this occasion he'd felt powerless. Trying to stop a targeted killing "would be like pulling a lever to stop a massive freight train barreling down the tracks," he confided to a friend.

### **5.3 The Case of al-Majalah, Yemen, 17 December, 2009**

The case of al-Majalah brings the discussion to another theatre of President Obama's war against Al Qaeda, namely to the Republic of Yemen. In Yemen, an Al Qaeda-affiliated group called AQAP (Al Qaeda in the Arabian Peninsula) had announced its intent on striking Western targets, increasingly worrying the Obama administration during its first year in office (Mazzetti 2013, 229). In consequence, on December 14, 2009, the State Department designated AQAP as a terrorist organisation (Johnsen 2014, 251). Reportedly, the intelligence community had obtained information about an attack that was in the end stages of planning but, at the same time, the information

was non-specific. As Savage (2015, 224) quotes the head of the National Counterterrorism Center at the time, Mike Leiter: “We thought it was going to be something in Yemen, (...) So we surged resources for targeting in Yemen (...) to disrupt that ‘something,’ even though we didn’t know what it was.”

Yemen had not been in the centre of attention before as most resources were allocated to the wars in Afghanistan and Iraq. Consequently, the CIA and JSOC had only a small number of operators on the ground. Having said that, however, in late 2009, as part of what Leiter referred to as a “surge,” JSOC was able to expand its presence in the Arabian Peninsula due to freed-up resources from the drawdown in Iraq (Mazzetti 2013, 229). This troop increase was part of an agreement between the US and the Yemeni government that allowed the US to attack Al Qaeda in Yemen as long as the US did not publicly acknowledge its involvement in the strikes (Savage 2015, 224). As another part of the arrangement, the head of the US Central Command, General Petraeus, in late September 2009, signed a classified order which “authorized the military to conduct a host of unconventional missions in Yemen” (Mazzetti 2013, 229). These operational plans, however, were rejected by the Obama administration. The Yemeni president would not allow US ground troops to run interrogation facilities in Yemen or to employ lethal force in commando raids. In addition, the Obama administration, facing opposition in its attempt to close the prison at Guantánamo Bay, did not want to add new prisoners from Yemen. Consequently, Admiral McRaven, the JSOC commander, was asked to find an alternative approach for Yemen (2013, 230).

The alternative that was employed in the US counterterrorism campaign directly leads to the case of al-Majalah, the first airstrike in Yemen President Obama authorised: “Al Majalah was the opening salvo in America’s newest war. Unlike the CIA’s ‘covert action’ programs, which require formal notification to the House and Senate intelligence committees, this operation was done under a military ‘Special

Access Program,' which gives the armed forces wide latitude to conduct lethal, secret operations with little, if any, oversight" (Scahill 2013, 307). Mazzetti's basic summary (2013, 230) of this approach indicates that while al-Majalah was the first such employment of lethal force, it would not remain the only one: "What followed was a strange, half-baked campaign: a quasisecret war undermined by sometimes absurd attempts to hide the American hand in military operations. (...) The results were unsightly, and over the next several months the American strikes in Yemen would claim more civilian casualties than senior operatives affiliated with al Qaeda in the Arabian Peninsula." According to Human Rights Watch (HRW 2013, 69),

Al-Majalah is a tiny village at the foot of steep mountains about 230 kilometers east of the southern port city of Aden. It has no schools, electricity or other services; as one resident put it, 'The government does not exist here.' The area that was hit lies on the edge of the village – a stretch of shrubs and rocky earth whose coppery color was in keeping the US codename for the strike, 'Operation Copper Dune.' There, Bedouins from two al-Majalah families tended bees and put their sheep and goats to graze. They slept in huts made of straw and wood or of steel caging on which they draped their tenting.

On December 16, Admiral McRaven briefed the White House, the Pentagon, and the State Department about plans to attack three AQAP targets using cruise missiles. JSOC wanted to strike within the next twenty-four hours. Due to the fact that it would be the first bombing in Yemen authorised by the Obama administration, the meeting involved some seventy-five officials, exceeding the number of participants normally taking part (Scahill 2013, 303). According to Klaidman (2013, 199), the primary target was Mohammed Saleh Mohammed Ali al-Kazemi who was code-named "Akron." He was considered to be a deputy of AQAP in Abyan province. JSOC had followed him for months and had now confirmed his presence in a camp near al-Majalah. Using high-tech surveillance, the US had concluded that al-Kazemi was "in the late stages of planning a terrorist attack on the US embassy in Sana'a. A team of AQAP suicide bombers would soon be strapping on their explosives-laden vests and heading for the Yemeni capital. There was no time to lose" (2013, 199).



Reportedly (Shane 2015, 205), General Petraeus “pushed hard for what he said was a rare opportunity to take out a large number of militants.” In addition to al-Kazemi at al-Majalah, the military also wanted to hit targets “Cleveland” and “Toledo” who were suspected to be “located in the area” as well (Klaidman 2013, 199). The third target, objective “Cleveland,” had been added by General Petraeus “at the last minute because evolving intelligence suggested a particular operative had just arrived at the location” but the Pentagon general counsel approved only the first two strikes as he considered the potential collateral damage of a strike against Cleveland as too high (Savage 2015, 225). In particular, the presence of women and children in proximity of the target seems to have underpinned that decision (Klaidman 2013, 210).

According to Klaidman (2013, 200), the meeting “unfolded in a crisis atmosphere.” The Pentagon’s general counsel, throughout the meeting, felt “heavy pressure by the military” to approve the strikes as well as “rushed and unprepared:” “(...) it was like a one-hundred-car freight train hurtling down the tracks at eighty miles an hour. You would have to throw yourself on the tracks to try to stop it” (2013, 210). In the late afternoon of December 16, the lawyer had been provided with PowerPoint slides, the so-called “baseball cards,” which pointed out al-Kazemi’s terrorist history as well as potential strike options.

They displayed a color picture of the target and physical characteristics, including his estimated height and weight. Below the photo was a kind of terrorist curriculum vitae, listing his rank in the organization, professional expertise, and links to individual attacks. Akron was an operational planner and was believed to have been responsible for a July 2007 suicide bombing that killed nine people, including seven Spanish tourists. Farther down, in small print, was the specific intelligence backing up the military’s claims – humint if it came from a spy, or signit if it was based on electronic surveillance. (2013, 200)

In addition, a Yemeni parliamentary investigation (2010, 5-6) labelled al-Kazemi an “Al-Qaeda leader” who had financed terrorist activity and brought up to twenty Saudi, Emirati and Pakistani Al Qaeda members to the camp at al-Majalah, including “a Pakistani expert in poisons and explosives.” Local residents told Human

Rights Watch (2013, 75) that while there were foreigners who had joined al-Kazemi at al-Majalah “they were not aware that he was engaged in military operations and had not seen a training camp, but added that they could not be sure.” As to the relationship between the civilians and the alleged terrorists, Shane (2015, 208) reports that “The local Bedouin families had been paid to provide food, laundry, and other services to the Al Qaeda camp, but there was no evidence and no likelihood that they shared the militants’ ideology or posed any direct threat to Americans.”

However, there are also aspects which are not quite as clear about the actual role of al-Kazemi. For example, Human Rights Watch (2013, 74) provides further information about target Akron’s past as well as his role during the time before the strike at al-Majalah: “Al-Kazami fought in Afghanistan in the 1980s; he was among hundreds of Yemenis who joined the *mujahideen* with the approval of the Saleh government and tribal leaders. He was arrested in 2005 by Yemeni security forces on suspicion of terrorism-related crimes and served about two years in prison. Upon his release, al-Kazami returned to Abyan and ultimately ended up in al-Majalah, where he had relatives, and lived with his wife and four children there. The parliamentary report said that he had pledged ‘to not get involved in activities with Al-Qaeda.’” Scahill (2013, 312), in interviews with Yemeni journalists and security analysts, was told that they “were puzzled as to why Kazemi was being portrayed as an al Qaeda leader, pointing out that he was an aging veteran of the earlier wars in Afghanistan and was not a senior figure within AQAP.” Moreover, according to Woods (2012), al-Kazemi had wanted “to start a new life” after having been released from prison.

In terms of strike options, the military suggested several missile options including sea-based strikes, helicopter raids, and fixed-wing aircraft attacks. Capture missions involving ground troops were ruled out (Klaidman 2013, 201). With regard to the execution of the mission there was a close coordination between several departments. As Scahill (2013, 308) reports, “A military source familiar with the

operation told me al Majalah was a 'JSOC operation with borrowed Navy subs, borrowed Marine Corps, Air Force and Navy surveillance aircraft and close coordination with CIA and DIA on the ground in Yemen. Counting the crew of the sub we're talking 350-400 [people] in the loop.'"

Although it seems that the military had been pushing hard for the strike and President Obama finally approved the operation, Shane (2015, 205-206), quoting a senior figure within the president's circle, notes that the administration was aware of the risks such an operation entailed. "But General James Jones, then Obama's national security adviser, said officials knew intelligence on targets in Yemen was still a work in progress, especially compared to Pakistan. 'It was case by case and trying to get some assurances that in fact that target was where we thought he was, who we thought he was, would be there when we thought he was,' Jones said in an interview. 'It was more difficult because it was kind of an embryonic theater that we weren't really familiar with.'" The risk of killing the wrong people also shines through in the Pentagon's legal counsel reportedly having said after the al-Majalah strike: "If I were Catholic, I'd have to go to confession" (Klaidman 2013, 210). Having said that, however, Savage (2015, 225) argues that it would be wrong to interpret this quote as "an expression of remorse about civilian casualties," because it was made before news broke about civilian casualties.

The day after the president's signing off on the strike, on December 17, JSOC launched surveillance aircraft to monitor the targets before firing Tomahawk cruise missiles armed with cluster munitions from a US submarine positioned near Yemen's coast (Scahill 2013, 307). The missiles hit two adjacent sets of Bedouin huts at around 6 am, bringing death to their inhabitants while most of them were asleep (HRW 2013, 69). On the day of the attack, the Yemeni government took responsibility for having carried out the strike, claiming it had killed "around 34' al Qaeda fighters" (Mazzetti 2013, 231). As was later revealed by two leaked diplomatic cables, the US collaborated

in hiding its involvement in the attack and, until the present day, has not publicly acknowledged its hand in the strike, leading Woods (2012) to call it a “cover up.” Later reports questioned the initial casualty count, establishing that a significant number of civilians had been killed alongside the alleged terrorists. The most up-to-date numbers refer to fourteen potential militants killed alongside forty-four dead civilians from two extended families. Among the civilians killed were twelve women, five of them pregnant, and twenty-two children (Woods 2015, 196). The Yemeni parliamentary investigation (2010, 5) claimed that after the bombing “a group of youngsters from Al-Qaeda surrounded the site of the incident, retrieved six dead bodies from the area and transported seven wounded to the hospital.” In the aftermath of the attack, four additional civilians died and thirteen were wounded due to exposure to unexploded bomblets from the cruise missiles (HRW 2013, 68).

In a secret but later leaked meeting between General Petraeus and the Yemeni president on January 2, 2010, the latter congratulated the US on the strikes but also mentioned that “‘mistakes were made’ in the killing of civilians in Abyan” (US Embassy Sana’a 2010). During the meeting, General Petraeus claimed that no civilians had been killed in the strike. While Woods (2012) and Shane (2015, 207) suggest that Petraeus had been poorly briefed it seems more likely, however, that the general was employing a novel way of classifying combatants which the Obama administration had introduced: “Unless there was explicit intelligence exonerating specific individuals, the administration had decided to count all males of military age found at the strike site as combatants” (Johnsen 2014, 260).

Given the high casualty count as well as the information that evolved regarding the operation’s planning it is unsurprising that al-Majalah attracted significant critical scrutiny. Human Rights Watch (2013, 70) quotes an eyewitness that, in the aftermath of the attack, the Yemeni government and state media had reported that the area around al-Majalah was “an impenetrable mountain enclave stashed with weapons, ‘as

if it were Tora Bora.” In fact, however, the site was in a valley and accessible by car. Besides the people killed, the thirty houses near the strike site were all burned. Human Rights Watch (2013, 70) raises the question why the US employed a model of Tomahawk missile equipped with cluster munitions designed to spread sub munitions over a wide area. Scahill (2013, 308) adds that “the bomblets were also equipped with an incendiary material, burning zirconium, that set fire to flammable objects in the target area.” There has been some discussion why alternatives like, for example, armed drones had not been employed instead. Shane (2015, 206) points out that cruise missiles had been the only option available given the fact that Djibouti, from where the US launched its drones, only allowed the US to fly unarmed drones at the time. In addition, as Woods (2015, 61) notes, even if drones had been available, the Yemeni government had forbidden the use of drones after the first US targeted killing via drone in Yemen in 2002. Scahill (2013, 312), adding a further possibility, referred to unnamed US officials who “cited strained resources” as the reason why cruise missiles were employed. As the CIA’s armed drones were stationed in Pakistan, cruise missiles were the only way to strike at the time. In line with Scahill’s claim, Woods (2015, 195-196) argues that “JSOC had to depend on whatever assets it could acquire from regular forces,” making the resort to cruise missiles inevitable. Relatedly, following this train of thought, the lack of US resources in Yemen may also have had an impact on the assessment of acceptable collateral damage. Woods (2015, 193) quotes a former JSOC analyst as follows: “In order to eliminate the threat, or in more literal terms assassinate this person (...) commanders and decision-makers are more likely to go through with a strike, even if it means that other innocent people are involved, because of the limited opportunities to strike.”

Furthermore, the Yemeni parliamentary investigation (2010, 7) concluded that mistakes were made in identifying the correct “geographic coordinates and the determination of the location.” Human Rights Watch (2013, 71) quotes an anonymous Yemeni official saying “They hit multiple encampments and they were only supposed

to hit one,' (...) 'That one you could argue was bad intelligence from the Yemenis.'" Johnsen (2014, 265-266) points out that the US's heavy reliance on information from Yemeni authorities in absence of its own intelligence was a serious flaw in its approach as it entailed the risk of "getting played." Although, as Shane (2015, 204) notes, the US had been aware of this risk, it could not escape its reliance on Yemen in terms of HUMINT [Human Intelligence]. In this light, the role of SIGINT [Signals Intelligence] became even more important, as illustrated by the present case which, as pointed out above, seems to have been brought to attention by SIGINT. Moreover, the question was asked why there had been no attempt to capture al-Kazemi. According to Human Rights Watch (2013, 74-75) "Whatever his ties to violent militants, al-Kazami traveled freely through the area upon his release from prison, suggesting ample opportunities for capture. Indeed, residents said his movements required him to pass multiple checkpoints at which security forces could have detained him. Surveillance aircraft had been flying low over the area two months before the strike, residents said, suggesting the authorities could track al-Kazami's movements."

Finally, given the critique listed above, it seems that the Obama administration felt some uneasiness regarding the action it had taken at al-Majalah. Shane (2015, 209) quotes a White House official telling him that when the administration became aware of the destruction caused, "The president wasn't happy with it, and so we went through a very long process led by Brennan to tighten up how we take lethal action in Yemen,' the aide said. 'We were aware of blowback on the ground and how off things had gotten.'" As a practical consequence, the US stopped employing cruise missiles in Yemen after al-Majalah (2015, 227).

The destruction of the strike was followed by heavy protests by the local population. On December 20, a protest gathering was held at al-Majalah with tribal leaders from the entire country in attendance. The public outrage against the strike, which was assumed to have been carried out by the US would later lead to the

parliamentary investigation cited above. Regarding this public backlash, Scahill (2013, 312) quotes a “senior Yemeni official:” ““The involvement of the United States creates sympathy for Al Qaeda. The cooperation is necessary – but there is no doubt that it has an effect for the common man. He sympathizes with Al Qaeda.””

## **5.4 The Case of Datta Khel, Pakistan, 17 March, 2011**

The next case turns the spotlight to the country in which the targeted killing of Osama bin Laden would take place about six weeks later. In mid-March of 2011, US-Pakistani relations were in a poor condition. Contributing to this state of affairs had been the Raymond Davis incident, a diplomatic affair involving a CIA contractor who killed two Pakistanis whom he accused of trying to rob him, as well as a public backlash against the CIA’s drone campaign in the Pakistani tribal areas. Mazzetti (2013, 290) reports that there was the impression with senior non-CIA officials within the Obama administration that the agency “seemed to be conducting a war in a vacuum, oblivious to the ramifications that the drone strikes were having on America’s relations with Pakistan’s government.”

The incident at Datta Khel is one of the best-reported cases of one of the CIA’s targeting procedures. Before moving to the details of the particular case, it is worth considering this practice generally.

The CIA had approval from the White House to carry out missile strikes in Pakistan even when CIA targeters weren’t certain about exactly who it was they were killing. Under the rules of so-called signature strikes, decisions about whether to fire missiles from drones could be made based on patterns of activity deemed suspicious. (...)

For instance, if a group of young “military-aged males” were observed moving in and out of a suspected militant training camp and were thought to be carrying weapons, they could be considered legitimate targets. American officials admit it is somewhat difficult to judge a person’s age from thousands of feet in the air, and in Pakistan’s tribal areas a “military-aged male” could be as young as fifteen or sixteen. Using such broad definitions to determine who was a “combatant” and therefore a legitimate target allowed Obama administration officials to claim that the drone

strikes in Pakistan had not killed any civilians. It was something of a trick of logic: In an area of known militant activity, all military-aged males were considered to be enemy fighters. Therefore, anyone who was killed in a drone strike there was categorized as a combatant, unless there was explicit intelligence that posthumously proved him to be innocent. (2013, 290-291)

This targeting practice was no invention of the Obama administration. In fact, signature strikes had been introduced by the late Bush administration. As Woods (2015, 114) notes, the CIA, during its first four years of conducting targeted killings post-9/11, had only deliberately targeted known individuals. With the introduction of signature strikes, the practice of targeting known individuals was re-labelled as “personality strikes.” The rationale behind employing signature strikes is to weaken the network of the enemy which, it is argued, can be achieved by expanding targeting beyond known individuals. A senior US counterterrorism official explains the concept: “The enemy has lost not just operational leaders and facilitators [in Pakistan] – people whose names we know – but formations of fighters and other terrorists. We might not always have their names, but (...) these are people whose actions over time have made it obvious that they are a threat” (Cloud 2010). This concept, apparently, was embraced by the Obama administration. As Woods (2015, 115) notes, signature strikes “would come to dominate phases of the secret Pakistan drone war.”

On March 16, 2011, the CIA carried out a drone strike against a car near Datta Khel which killed five suspected insurgents. This strike, according to Woods (2015, 232), might have directed the CIA’s attention toward a gathering of people in the actual village of Datta Khel. Datta Khel is situated in North Waziristan in the Federally Administered Tribal Areas (FATA) of Pakistan. Masood and Shah (2011) describe the situation at the time of the strike as follows: “The region is under the sway of a local warlord and Taliban commander, Hafiz Gul Bahadur, who made a truce with the government as the Pakistani military pushed into South Waziristan in 2009. But Mr. Bahadur has accepted many Taliban fighters who fled the campaign into his area, and



he continues to have close ties to the Haqqani network, a militant group allied with the government and the Taliban that uses North Waziristan as its main base to launch attacks against American forces in Afghanistan.”

It does not surprise then that Roggio (2011) classified Datta Khel as “a known hub of Taliban, Haqqani Network, and Al Qaeda activity.” Zooming in on the event going on in the village on March 17, it was common practice for the Taliban as “reigning authorities in the area” to “settle disputes between tribes with competing claims” (Masood and Shah 2011). With regard to the exact background of the meeting,

(...) some 40 individuals gathered in Datta Khel town center. They included important community figures and local elders, all of whom were there to attend a Jirga — the principal social institution for decision-making and dispute resolution in FATA. The jirga on March 17 was convened to settle a dispute over a nearby chromite mine. All of the relevant stakeholders and local leaders were in attendance, including 35 government-appointed tribal leaders known as maliks, as well as government officials, and a number of khassadars (government employees administered at the local level by maliks who serve as a locally recruited auxiliary police force). Four men from a local Taliban group were also reportedly present, as their involvement was necessary to resolve the dispute effectively. (Stanford and NYU 2012, 58)

Adding further detail, Coll (2014) quotes a tribal leader: “There were two tribes in the area, Manzarkhel and Maddakhel. (...) The dispute was between these two tribes. They were taking chromite out, but there was a question of who owned what.” A UN investigation (Emmerson 2014) found that precisely at issue was the method of payment of 8.8 million rupees for the mining rights.

The gathering had been officially sanctioned by the Pakistani government and the maliks had notified the local military post about the planned gathering ten days beforehand (Woods and Lamb 2012). It took place in the Nomada bus depot, “an open space in the middle of town large enough to accommodate over 40 people as they sat in two large circles about 12 feet apart” (Stanford and NYU 2012, 58). According to the UN report (Emmerson 2014), the field of the jirga was close to many shops and other businesses as well as near a parking lot used by bazaar visitors.

Regarding the kinetic action on March 17, the CIA fired a missile at one of the circles of seated men at about 10:45 am. In rapid succession, several further missiles were fired. At least one of these hit the second circle of the meeting. The operation killed at least forty-three people while injuring an additional fourteen (Stanford and NYU 2012, 59). According to Woods (2015, 233), “The bus station and surrounding buildings were still burning six hours after the drone strike, eyewitnesses reported. Body parts were scattered for hundreds of yards, and had to be collected up in sacks.” Reportedly, contributing to the strike decision was the fact that the US, due to its poor relations with Pakistani authorities, no longer had access to Pakistani field intelligence. In this light, the CIA had been monitoring Datta Khel after the strike on March 16, making an attempt at assessing the gathering. Gannon et al. (2011) quote US officials apparently referring to the four Taliban present at the jirga that “the CIA tracked the militants driving to the meeting and decided rather than targeting just the car, they would wait to get the entire assembled party.” According to Savage (2015, 254), the CIA did not know the names of the men in the car, relying on their “patterns of life” instead. The final judgement, according to Woods (2015, 232), had apparently been that there was enough information to carry out a signature strike. As basis for this claim Woods relies on Shane (2011) who quotes US officials arguing that “The fact is that a large group of heavily armed men, some of whom were clearly connected to Al Qaeda and all of whom acted in a manner consistent with A.Q.-linked militants, were killed.”

The strike at Datta Khel was the Obama administration’s 202<sup>nd</sup> drone strike in Pakistan (Woods 2015, 231). In the week preceding the strike at Datta Khel, the CIA had carried out five further strikes (Masood and Shah 2011). On the previous day, the Davis affair had been resolved under a “blood money’ arrangement” which led to the release of the CIA contractor and his return to the US (Mazzetti 2013, 291). The Davis affair seems to be of considerable significance for the events at Datta Khel because the incident allows two opposite interpretations given one accepts the strike killed

innocent people. In fact, it must be noted that the US maintains that the strike hit a gathering of senior militants and had thus been a legitimate target (Stanford and NYU 2012, 57). One official was quoted saying: “These people weren’t gathering for a bake sale. (...) They were terrorists” (Masood and Shah 2011). First, the CIA drone strike might have been a demonstration of power in light of the diplomatic repercussions of the Davis affair. As Mazzetti (2013, 291) reports, “(...) some American officials suspected that the massive strike was the CIA venting its anger about the Davis episode. Munter [the US ambassador to Pakistan] thought that General Pasha, the ISI chief, had gone out on a limb to help end the Raymond Davis affair and that the Datta Khel strike could be perceived as a deliberate thumb in the eye.” A different journalistic account (Gannon et al. 2011), refers to an anonymous US official who argued that “the strike reflected the CIA’s anger at the ISI, which it blamed for keeping Davis in prison for seven weeks.’ ‘It was retaliation for Davis,’ the aide said. ‘The CIA was angry.’” In addition, former ISI chief Durrani told Woods (2015, 233) that the strike was “clearly a show of [American] anger.” Noteworthy in this regard is that the US ambassador made a request not to carry out the strike because of his concern about a further deterioration of US-Pakistani relations. This request, however, was rejected by the CIA director “who insisted on going ahead” (Gannon et al. 2011). Second, related to the inherent dangers of signature strikes pointed out above, “many American officials believed that the strike had been botched, and that dozens of people died who shouldn’t have” (Mazzetti 2013, 291). The exact rationale behind the strike notwithstanding, US-Pakistani relations deteriorated further, with General Kayani claiming the US had acted ““with complete disregard to human life,”” as well as anti-American street protests taking place in major Pakistani cities (2013, 291).

## **5.5 The Case of Osama bin Laden, Pakistan, 2 May, 2011**

The killing of Osama bin Laden is a curious case. On the one hand, the killing of Al Qaeda's leader has arguably been the best-publicised targeted killing in recent history. Even a minor industry developed telling those interested how the operation unfolded, including a Hollywood blockbuster produced by Walt Disney. Moreover, the bin Laden raid has been subject to vivid legal (see, e.g., Ambos and Alkatout 2012; Beres 2011; Paust 2011; Wallace 2012) as well as moral (see, e.g., Govern 2012; McMahan 2012a; Strawser 2014; Walzer 2011) debate. However, with the hindsight of several years, much uncertainty remains as two irreconcilable accounts have emerged regarding what really happened in Abbottabad, Pakistan on 2 May, 2011.

### **5.5.1 The Official Account**

What in the following will be called the official account of the killing of bin Laden has been put forward by the Obama administration, numerous journalistic investigations, as well as autobiographical accounts. Although these accounts vary in minor detail, it is possible to tell one comprehensive and non-contradictory story of the planning process and the actual raid which killed arguably the world's most infamous terrorist leader. The following mainly relies on Bowden's (2012) narrative. Bowden provides a thorough account of the deliberations within the administration in a "fly-on-the-wall" style as well as the minutiae of the actual raid. His account also stands out compared to others because of the access he had to key decision-makers, including President Obama. Bowden's account was also specifically taken as the point of departure for Hersh's (2016) counter-narrative which will later be discussed as the "unofficial account."

Starting with bin Laden's personal background, due to the fact that he easily ranked among the world's best recognised personalities, this section, because of space limitations, will not provide a biographical account of bin Laden and the emergence of Al Qaeda. These aspects have been covered elsewhere (see, e.g., Bergen 2011; Kean

and Hamilton 2004; Wright 2007) and, therefore, it is taken for granted that bin Laden was responsible for plotting terrorist attacks against the United States, most prominently the assault of September 11, 2001. Bin Laden's responsibility for the attacks seems to have been established both by US investigations (Kean and Hamilton 2004) as well as his own claims of having ordered the assault (Bergen 2012, 36). Moreover, this chapter will not address previous attempts to end bin Laden's life by both the Clinton and Bush administrations.

In June 2009, the Obama administration renewed the effort to come up with a plan to finally track down bin Laden after years of unsuccessful efforts by the Bush administration. Apparently, the new president's rationale behind stepping up the hunt for bin Laden was multi-faceted. In contrast to his immediate predecessor, Obama did not consider the US generally at war with terrorism, but at war nonetheless with specific individuals who had attacked the country in the past and posed a continuing threat (Bowden 2012, 60). Specifically concerning bin Laden, Obama, shortly after taking office, had ordered a review on US policy in Afghanistan whose lead author told the president that, contrary to many analysts' conclusions, bin Laden's current role was more than that of a figure head. Quite the contrary, he was still actively plotting attacks: "He communicates with his underlings and is in touch with his foot soldiers. His troops believe they are getting his orders, and we know from good intelligence that they are" (as quoted in Woodward 2010, 105).

Having said that, Obama's concern with bin Laden seems to have gone beyond his posing a continuing threat through his role in directing Al Qaeda. If one were to follow Bowden's assessment (2012, 61), elements of desert also seem to have featured in Obama's thinking: "As Obama saw it, there was no way to defeat Al Qaeda so long as its founder and spiritual leader remained at large. He was the soul of the organization. The president believed that bin Laden wasn't just evil, he was *charismatically* evil." Bowden (2012, 185) suggests that Obama thought that "getting

bin Laden would be like closing an open wound” to America. In an interview with Bowden (2012, 256), Obama himself, in admittedly vague terms, hinted at a retributive element in authorising the bin Laden raid: “When I went up to New York for that small ceremony after bin Laden was killed, to talk to those guys at the fire station who had lost half their unit, and to meet with the children of those who had been killed in 9/11, and the widows and the widowers, and to just understand how fully they appreciated that America hadn’t forgotten about them and what happened, the feelings were profound.” The assumption that retribution played a role in the decision to target bin Laden has also been supported by some of Obama’s secretaries. Secretary of Defence Gates (2015, 544) recalls the mood in the Situation Room after the mission: “Even after the helicopters had returned safely, there was no celebration, no high-fives. There was just a deep feeling of satisfaction – and closure – that all the Americans who had been killed by al Qaeda on September 11, 2001, and in the years before, had finally been avenged.” A similar idea shines through in Secretary of State Clinton’s memoirs. During the deliberations leading up to the raid and in response to administration officials who were concerned about the repercussions of violating Pakistan’s sovereignty and the nation’s national honour, Clinton (2014, 171) claims to have said: “‘What about *our* national honor?’ I said, in exasperation. ‘What about *our* losses? What about going after a man who killed three thousand innocent people?’”

Closely related, the end of achieving justice also seems to have featured in Obama’s decision to green-light the raid. As Bowden (2012, 162) describes Obama’s way of thinking during pre-raid discussions: “So success would be a demonstration of justice achieved at great cost and sacrifice, and with tremendous skill. It would be a satisfying achievement for America and the world, an emotional turning point, but more, it would vindicate the determination and skill of everyone who had given of themselves – in some cases *all* of themselves – to the struggle.” This thinking seems to have been vindicated after the killing of bin Laden when Obama, in his speech that disclosed the raid, stressed that in killing bin Laden, “justice has been done” (Obama

2011). In addition, the idea of retribution also seemed to shine through when the first person Obama called, immediately after the execution of the operation, was his predecessor George W. Bush (Bergen 2012, 235). The idea of justice seemed to resonate with the American people as indicated by celebrating groups of people in various places around the country. As Mahler (2015) summarises the raid's impact on the American psyche: "Symbolically, it brought a badly wanted moment of moral clarity, of unambiguous American valor, to a murky war defined by ethical compromise and even at times by collective shame. It completed the historical arc of the 9/11 attacks. The ghastly image of collapsing towers that had been fixed in our collective minds for years was dislodged by one of Obama and his senior advisers huddled tensely around a table in the White House Situation Room, watching closely as justice was finally brought to the perpetrator."

Furthermore, neutralising the threat posed by America's public enemy no. 1 would doubtlessly have been a major political success for Obama. It should be mentioned that Obama at the time was facing significant opposition regarding the implementation of his political agenda and he was planning to announce his candidacy for a second term. In addition, the death of bin Laden would enable Obama to argue that Al Qaeda was on the path of defeat, providing support to his decision to reduce the US military footprint in Afghanistan (Mahler 2015). Although not directly suggesting that the hope for domestic political gain featured prominently in Obama's decision to authorise the bin Laden raid, Bowden (2012, 188-189) alludes to the idea that it did play some role. "Killing bin Laden would be one accomplishment that even Obama's worst critics would acknowledge. Here was the one arena where a president could decide and act without outside political interference, especially given the covert nature of the enterprise. (...) No one involved with Obama's handling of the bin Laden effort saw the slightest hint that politics shaped his thinking, but there's no question success would help, and that a public failure would hurt."

More than a year after Obama had given new emphasis to the hunt for bin Laden, in August 2010, the agency was able to establish the identity of his personal courier which focused the CIA's attention on a compound in Abbottabad, Pakistan. "The house stood inside a large triangular-shaped compound at the end of a dirt road about a half hour drive north of Islamabad, the capital of Pakistan, in a neighborhood called Bilal Town. Abbottabad was in a basin surrounded on all sides by the rugged Sarban Hills. The drive from the capital was uphill, and Abbottabad's relatively cool air made it an escape for well-to-do residents of the big city during the brutally hot summer months. There were several golf courses nearby. One mile away was Pakistan's large military academy at Kakul" (2012, 134). After intensive and innovative surveillance of the compound, the CIA assumed that bin Laden might live there and first informed the president about its assessment (Schmidle 2011). Reportedly, the president was intrigued but not "especially hopeful" (Bowden 2012, 66) about the new lead.

Despite calls for rapid action from within the CIA, Obama apparently wanted to avoid a rushed decision, telling the agency to "work harder" (2012, 151) on identifying the person suspected of being bin Laden. Subsequently, the CIA made considerable but unsuccessful efforts to establish the identity of bin Laden, including the consideration of flooding the compound, setting it on fire or detonating a stink bomb as well as the actual implementation of a fake vaccination programme aimed at providing the agency with DNA samples (2012, 154-155). In addition, given the numerous aspects Obama had to consider if he decided to apply force in the absence of conclusive intelligence – harm to diplomatic relations with Pakistan, the potential risk of US soldiers, concern for collateral damage, and the domestic political consequences in an election year, the administration had three different red teams review the operation against bin Laden (Zenko 2015, 99). Furthermore, the administration put significant emphasis on the legal aspects of the raid, asking its legal advisers to write memos for various contingency plans (Savage 2015, 257-271).



In late 2010, President Obama ordered the CIA to explore kinetic options against the compound. The two basic options available were to either bomb the compound or to order a commando raid. Despite calls from within the agency to rely on its own operators, CIA director Panetta got in contact with the US military's Special Operations Command which had acquired significant experience with kill-or-capture missions in the war theatres of Afghanistan and Iraq (Bowden 2012, 151). The raid, although being carried out by the military, was going to be executed as a CIA covert operation thus avoiding the traditional military chain of command (Bergen 2012, 167). In addition, according to Panetta (2015, 316), members of Congress were informed about the raid before it was executed. The CIA initially developed five possible assault options: First, the US would provide Pakistani authorities with the intelligence and they would carry out a commando raid. Second, the US would collaborate with the Pakistani intelligence service ISI in a joint mission. Third, the US would undertake a unilateral drone strike on the compound. Fourth, the CIA would carry out a commando raid with its own operators or, alternatively, with a surrogate force. Fifth, JSOC would lead a commando raid in close collaboration with the CIA (Jones 2012, 419-423). Due to the tense US-Pakistani relationship at the time as well as the fear that working with Pakistan in this matter would lead to mission failure, the Obama administration quickly determined that any operation would take place without informing Pakistan (Bergen 2012, 180). In the discussions between the CIA and the JSOC unit, the latter's significant experience with raids as well as its logistical capacities, convinced the former that in case the president chose a ground option, JSOC would carry it out (Bowden 2012, 154).

During a principals meeting on March 14, 2011, President Obama was presented with two assault options. As the president was briefed, the sense of urgency to act increased as the administration feared leaks which could potentially risk the mission (2012, 157). The meeting also included a discussion about the certainty of bin Laden actually being in the compound. Assessments varied between 95% certainty

and just 30%, with Obama concluding: “This is fifty-fifty, (...) Look guys, this is a flip of the coin. I can’t base this decision on the notion that we have any greater certainty than that” (Bowden 2012, 163).

The first and “simplest” option was bombing the compound by B-2 aircraft using “thirty or more” precision bombs, or instead firing a comparable amount of missiles (2012, 163-164). The compound would be completely obliterated, killing all people in it. The risk to US soldiers would be low, as the high flying B-2 would likely evade Pakistani defences. Moreover, with no ground troops involved, there was no risk of encountering Pakistani authorities on the spot, a worry that inevitably arose with any commando raid option. According to Panetta (2015, 311) the president, given the apparent advantages, had initially favoured this option. However, the downside was that some significant collateral damage was likely, the estimated casualty count being between fifty to a hundred people (Savage 2015, 261). In consequence, according to Bowden (2012, 164), this concern led Obama to rule out a heavy bombing “immediately:” “America was not going to obliterate them on a fifty-fifty chance of also killing Osama bin Laden. (...) He said the only way he would even consider attacking the compound from the air was if the volume and precision of munitions was such that the blast area would be drastically reduced.” Obama’s concern about civilian casualties came despite the opinion of his lawyers that the military advantage of killing bin Laden justified “a significant number of civilian bystander deaths” on necessity and proportionality calculations (Savage 2015, 261).

The second option was a JSOC commando raid. The military was confident that, if the commandos could be brought to the compound, they “could clear it and kill or capture bin Laden with minimal loss of life” (Bowden 2012, 165). A major advantage besides the reduced collateral damage would be that the US could obtain proof of bin Laden’s identity in a ground raid whereas in the bombing option this seemed impossible (2012, 166). The downside was that the ground raid inevitably

entailed a risk of US soldiers being harmed during the assault as well as a potential confrontation with Pakistani authorities afterwards. Another aspect that was considered was that due to the mission being a CIA covert action, the US, in case of failure, could deny it. In concluding the meeting, Obama did not embrace either option but ordered the air force to develop a strike option that was more “surgical,” as well as further options including missiles or drones. Additionally, Obama wanted the military to develop the raid option further. In particular, he was interested in the ways of preventing Pakistan from noticing the violation of its sovereignty (2012, 167).

In the next meeting two weeks later, Obama was presented with the options he had demanded. Regarding the raid option, JSOC presented a fully-developed plan. The military was optimistic that it could evade Pakistani recognition but, during the meeting, “was grilled hard” (2012, 169) by the principals. A particular worry was the compound’s close proximity to Pakistan’s prime military academy. Concerned with the potentially harmful impact on US-Pakistani relations, various options were considered before the president decided that in case of a confrontation, the US soldiers would fight their way out. “So Obama told McRaven that if his SEALs went in, they were coming out. Bin Laden was an imperative that outweighed the relationship” (2012, 173). With regard to the air options, Obama was presented with two alternatives to the obliteration bombing. The first plan would use smaller bombs which would make it possible to target the compound alone and thus reduce collateral damage. The downside would be that the reduced load could not destroy any tunnels that might exist underneath the compound, a concern that had featured in previous discussions. Having said that, even this type of bombing would entail the risk of killing innocent people as the identity of bin Laden had not securely been established and, even in case he was there, the bombing would leave no proof that the US had killed him. The second plan was to target the person alone whom the CIA had identified as potentially being bin Laden. This might be done using “the equivalent of a sniper drone” (2012, 174) during one of the walks the bin Laden suspect used to take in the

garden beside the compound. “There would be no smoking hole in the center of Abbottabad, no dead wives and children, little collateral damage, if any, and there would be no potential dead or wounded SEALs, no chance of a sticky standoff against Pakistan’s armed forces at the compound” (2012, 174). Judging from the deliberations in the situation room, the drone option was considered to be “tempting” given its riskless-ness (2012, 196). Still, despite seemingly solving all of the conundrums the president was facing, the drone option could not provide proof that it had actually been bin Laden who was killed.

In sum, considering all of the options with the hindsight of Obama eventually embracing the ground raid, it seems plausible that he considered having proof of bin Laden’s demise supreme. Not having this proof, “meant that the uncertainty that surrounded this mission would live on, and that in some sense bin Laden would live on, even if it *had* been him” (2012, 175). In addition, Al Qaeda could continue its activities as if bin Laden was still alive, potentially issuing fake statements bearing his name (2012, 197).

At the end of the meeting, although Obama kept both the raid and the drone option at his disposal, Bowden (2012, 175) detected a “strong clue that Obama had already made up his mind.” It is also noteworthy that Obama ordered JSOC to start “full-dress rehearsals” of the raid (2012, 175). When it came to the final meeting on April 28, the majority of Obama’s security team was in favour of the raid option (2012, 198). One after the other, the principals had to choose among carrying out the raid, the drone strike, or to do nothing, and then defend their decision (2012, 201). The next morning Obama ordered the raid option, later sharing with Bowden (2012, 206-207) his final calculus:

The advantages of the raid were obvious and, to his way of thinking, outweighed the risks. A missile might go astray and, unlike taking a shot from a drone, the raid offered certainty. If bin Laden was there, they would know it and they would bring him out, dead or alive. Getting him without being able to prove it – worse, without *knowing* it – would forfeit a big part of the accomplishment. Here was a chance to bring closure

to the great tragedy of 9/11 and strike a mortal blow to al Qaeda. Add to that Obama's trust in McRaven, and the near-unanimous support of his advisers, and the decision was clear.

There was another compelling reason to send in the SEAL team. If this had been bin Laden's hideout for years, it might hold a trove of valuable information, perhaps the kind that would enable the United States to further dismantle al Qaeda. Obama knew the logic behind F3EAD. The only way to exploit bin Laden's personal data was to send in men who could collect it.

One final aspect that deserves consideration is the kill-or-capture question. With the hindsight of several years past it seems certain that the raid in Abbottabad was planned as a kill mission. Journalistic investigations (see, e.g., Cole 2017; Savage 2015, 266-268; Schmidle 2011) as well as autobiographical accounts by SEALs who took part in the raid (Bronstein 2013; Owen 2012, 192) confirm this view. Even the Obama administration admitted that killing bin Laden was the most likely outcome although claiming that, under certain circumstances, he would have been captured. Bowden (2012, 190) quotes President Obama that "Our basic attitude was that, given his dedication to his cause, the likelihood of surrender was very low (...) We also knew that there would always be the possibility of him strapping on explosives and trying to take out a team with him. So I think people's general attitude was, if he's going to surrender, he better be naked and on the ground. Had that occurred, then we would have arrested him and held him. I won't go into all the details of what those various steps would have been, but ultimately, we would have brought him to justice. We would have brought him back here." The argument that capture never had been an option seems to be backed up by the evidence that has so far become available which "suggests that if the SEALs had wanted to take bin Laden alive, they could have" (2012, 252). Having said that, however, it should at least be noted that Bergen (2012, 186) claims that the Obama administration had actually made very specific plans for how to deal with bin Laden in case of capture.

With regard to the conduct of the mission, twenty-three Navy SEALs and support soldiers were flown by helicopter from Jalalabad Air Field in eastern

Afghanistan to Abbottabad. Bin Laden's compound consisted of a guesthouse and a main house. One group of the SEALs first approached the guesthouse where they encountered "wild and ineffective" (Bowden 2012, 228) gunfire. The most likely source of this resistance was bin Laden's courier, Ibrahim Saeed Ahmed, who was killed when the SEALs returned fire. In this firefight, Ahmed's wife was wounded in the shoulder. After that, another group of SEALs entered the main house where bin Laden was supposed to reside, "clearing it methodically" (2012, 228). The following quote provides a detailed impression of bin Laden's final moments:

Abrar Ahmed, the courier's brother, was in a first-floor bedroom with his wife Bushra. Both were shot dead. They cleared the first floor room by room, encountering no further gunfire. They passed through two large storage rooms and a kitchen. No one knew the layout of the interior. When they encountered a locked metal door in the rear sealing off a stairway to the upper floors, they slapped on a small C-4 charge, blew it off its hinges, and moved up the stairs. Bin Laden's twenty-three-year-old son, Khalid, a slender bearded man wearing a white T-shirt, was shot dead at the top. There were wailing women and children on this floor, none of whom posed a threat. The team didn't know it yet, but there was only one adult male left in the compound, and he was in the third-floor bedroom. (...)

The SEAL team started up those stairs in single file, scanning different angles, searching while protecting each other. The first man up spotted a tall, bearded, swarthy man in a prayer cap wearing traditional flowing Pakistani clothes, the knee-length shirt worn over pajama-like bottoms. The lead SEAL fired at the man, who retreated quickly into the bedroom. At the top of the stairs the lead SEAL tackled two women, likely two of bin Laden's wives, fearing they were wearing explosive vests. The second SEAL up the stairs moved into the bedroom and encountered the tall man in the prayer cap, whom he recognized immediately. Bin Laden stood behind Amal, his hands on her shoulders. As she moved toward the SEAL he shot bin Laden twice in the head. The Sheik fell over backwards, face up, and the SEAL fired one more round into his head. The team members who followed pumped more rounds into bin Laden's torso, but he was already dead.

The engagement was over in seconds. In these final moments of shooting, Amal was shot in the leg. Bin Laden had a weapon on a shelf nearby, but had not picked it up. His identity was unmistakable, even with the grotesque wounds to his head. (2012, 228-230)

After the kinetic part of the operation, the SEAL team searched the building for intelligence, collecting a considerable amount of documents. Furthermore, the team

took bin Laden's body with them in order to establish his identity and bury his remains. All this took place in a rush as the SEALs had to expect the arrival of Pakistani authorities who, as pointed out above, had not been informed about the mission. After a water-proof identification of his identity, bin Laden's body was buried in the Arabian Sea (2012, 264).

### **5.5.2 The Unofficial Account**

The official account, despite minor inconsistencies, comes across as a credible chain of events but, in fact, was more of a composition of the viewpoints of the players involved, mainly the Pentagon, the White House, and the CIA (Mahler 2015). Soon after the public announcement of the raid, the Obama administration had to correct itself several times about the details of the operation. Compared to contradictions about who shot bin Laden or whether he was armed or not, however, the more serious question arising was whether the official narrative was an attempt to mislead the public about actual events. "Then there was the sheer improbability of the story, which asked us to believe that Obama sent 23 SEALs on a seemingly suicidal mission, invading Pakistani air space without air or ground cover, fast-roping into a compound that, if it even contained bin Laden, by all rights should have been heavily guarded. And according to the official line, all of this was done without any sort of cooperation or even assurances from the Pakistani military or intelligence service. How likely was that?" (Mahler 2015). In other words, there seemed to be reason to ask whether the official narrative was simply an example of "American mythmaking," and whether accounts such as Bowden's told a story the Obama administration had made up (Mahler 2015).

This question was taken up by investigative journalist Seymour Hersh (2016) who, in his account of the operation, claimed that Bowden had been played by the Obama administration. Before providing Hersh's account it should be said that his take remains controversial and has adamantly been denied by the Obama

administration as well as considered highly unlikely by Bowden and untrue by Bergen who also wrote a book about the raid (Mahler 2015). Having said that, however, some voices (see, e.g., Gall 2015) have judged at least parts of Hersh's claims to likely be accurate.

Hersh opens his account with the claim that the official narrative "might have been written by Lewis Carroll" (2016, 13). In particular, he asserts that the claims that the operation was an all-American mission and that Pakistani authorities had not been informed beforehand are untrue. Hersh (2016, 14-15) refers to a "retired senior intelligence official" as having told him the true story of the killing of bin Laden:

(...) that bin Laden had been a prisoner of the ISI at the Abbottabad compound since 2006; that Kayani and Pasha [chief of the army staff and director general of the ISI] knew of the raid in advance and had made sure that the two helicopters could cross Pakistani airspace without triggering any alarms; that the CIA did not learn of bin Laden's whereabouts by tracking his couriers, as the White House has claimed since May 2011, but from a former senior Pakistani intelligence officer who betrayed the secret in return for much of the \$25 million reward offered by the US, and that, while Obama did order the raid and the SEAL team did carry it out, many other aspects of the administration's account were false.

According to Hersh (2016, 16), the story about bin Laden's demise began with a walk-in at the CIA station in Islamabad, Pakistan by a former senior Pakistani intelligence officer in August 2010. He offered to provide the agency with the hiding place of bin Laden in return for the reward the US was offering. Sceptical about the veracity of the claim, the CIA started monitoring the compound in Abbottabad where bin Laden was allegedly living as a prisoner of the ISI, being used by that agency as leverage in its relations with Al Qaeda and the Taliban (2016, 24). Bin Laden was also said to be gravely ill so that the ISI placed a personal doctor next to the compound and bin Laden's upkeep was financed by Saudi Arabia (2016, 19). The US did not inform Pakistani authorities because of fears that the Pakistanis would move bin Laden elsewhere (2016, 18-19).



By October 2010, the CIA started discussions about kinetic options, similar to those discussed in the official account. The main hindrance in these discussions seems to have been obtaining proof that the person killed was actually bin Laden (2016, 17). Also in October, President Obama was briefed about the lead but his reaction was hesitant, demanding proof that bin Laden was actually living in the compound. To get Obama's support, the CIA, working together with JSOC, sought to obtain DNA evidence of bin Laden as well as convince the president about the risk-less nature of a night raid on the compound. These objectives, however, would only be achievable with Pakistani support (2016, 18). Consequently, Pakistani authorities were told about the US lead and US authorities secured Pakistani co-operation using both incentives and blackmail (2016, 19).

According to Hersh (2016, 22), Obama was facing significant risks at this early stage of planning, especially being worried about whether bin Laden was really in the compound, whether the story might be a Pakistani deception, as well as about the potential political repercussions in case of mission failure. The first concern could be resolved when the US obtained a DNA sample that proved bin Laden's identity. The other concerns were resolved when the US agreed with Pakistan about how the mission would unfold. Pakistan insisted the US "come in lean and mean" and that bin Laden had to be killed. Otherwise Pakistan would not allow the mission to take place (2016, 23). In the words of the retired officer on whom Hersh bases his account: "It was clearly and absolutely a premediated murder" (2016, 27). In order to prepare the assault on the compound Pakistani authorities agreed to establish a liaison office which would help US forces to plan the attack. By then, JSOC had started rehearsing the mission on a site in Nevada, using a mock-up of the Abbottabad compound (2016, 24). It was also agreed that after the killing of bin Laden, the US would use a cover story saying that bin Laden had been killed in a drone strike in Afghanistan so that any Pakistani involvement could be denied (2016, 26).

In terms of the actual unfolding of the raid, Hersh's version, again, deviates strongly from the official account. To begin with, there was no firefight when the SEALs entered the compound. The ISI guards had left the compound beforehand and there were no weapons present. An ISI liaison officer led the SEALs to bin Laden's quarters where the commandos used explosives to open the doors. Only one shot was fired, hitting one of bin Laden's wives, who was "screaming hysterically," in the knee (2016, 28). Hersh (2016, 29) then provides the following account of bin Laden's last moments:

"They knew where the target was – third floor, second door on the right," the retired official said. "Go straight there. Osama was cowering and retreated into the bedroom. Two shooters followed him and opened up. Very simple, very straightforward, very professional hit." Some of the SEALs were appalled later at the White House's initial insistence that they had shot bin Laden in self-defense, the retired official said. "Six of the SEALs" finest, most experienced NCOs, faced with an unarmed elderly civilian, had to kill him in self-defense? (...) The rules of engagement were that if bin Laden put up any opposition they were authorized to take lethal action. But if they suspected he might have some means of opposition, like an explosive vest under his robe, they could also kill him. So there's this guy in a mystery robe and they shot him. It's not because he was reaching for a weapon. The rules gave them absolute authority to kill the guy." The later White House claim that only one or two bullets were fired into his head was "bullshit," the retired official said. "The squad came through the door and obliterated him. As the SEALs say, 'We kicked his ass and took his gas.'"

It should be noted that, the rest of Hersh's account's veracity notwithstanding, at least one other investigative report (Cole 2017) supports the claim that bin Laden's body was mutilated by the SEALs. Moreover, Hersh (2016, 47) denies the official narrative of bin Laden's burial, quoting a source that the SEALs had "torn bin Laden's body to pieces with rifle fire. The remains, including his head, which had only a few bullet holes in it, were thrown into a body bag and, during the helicopter flight back to Jalalabad, some body parts were tossed out over the Hindu Kush mountains (...)"

After the killing of bin Laden, according to Hersh (2016, 30), the Seals found no such thing as a treasure trove of computers and storage devices. The claim that bin Laden had been running Al Qaeda's operations from the compound was untrue. As to

why the Obama administration made up the claim that bin Laden was still operational, Hersh (2016, 40) provides an aspect that will become important in our later discussion of the cases: “‘Why create the treasure trove story?’ the retired official said. ‘The White House had to give the impression that bin Laden was still operationally important. Otherwise, why kill him? A cover story was created – that there was a network of couriers coming and going with memory sticks and instructions. All to show that bin Laden remained important.’” Hersh also claims that the Obama administration explicitly used the bin Laden raid for political gain. Quoting a JSOC consultant (2016, 47), “‘the killing of bin Laden was political theatre designed to burnish Obama’s military credentials (...) It’s irresistible to a politician. Bin Laden became a working asset.’”

After the raid, the SEALs waited outside the compound to be picked up, not having to fear any confrontation with Pakistani authorities. Due to an unplanned crash of one of the helicopters that had brought in the SEALs the Obama administration, fearing that the original cover story would no longer work, decided to break the promise given to Pakistan and put forward the account of the bin Laden raid that has been discussed above as the official account (2016, 32).

## **5.6 The Case of Anwar al-Awlaki, Yemen, 30 September,**

### **2011**

The case of Anwar al-Awlaki takes the discussion back to Yemen where he was killed in an American drone strike on September 30, 2011. Arguably, this particular operation trumps the bin Laden raid in importance with regard to the debates leading up to the kill decision as well as its implications for the codification of the general targeted killing programme. As Shane (2015, xiii) notes, “Awlaki’s death secured him a place in history: at least since the Civil War, he was the first American citizen to be hunted down and deliberately killed by his own government, on the basis of secret

intelligence and without criminal charges or a chance to defend himself in court. Many Americans welcomed his demise, but its extraordinary circumstances, and the unsettling precedent it set, sparked a debate about law and principles that would go on for years.”

Due to the fact that al-Awlaki held dual American-Yemeni citizenship critics argued that killing him without trial was a violation of the American constitution. In addition, partly due to government secrecy, differing accounts emerged as to how grave a threat al-Awlaki posed and whether targeting him was justifiable. Crucially, his targeted killing laid bare the tension that led Walzer to first think about *jus ad vim* as lying somewhere in-between regular inter-state warfare and the justified use of lethal force by domestic police forces. As Shane (2015, 225-226) puts it:

The ambivalence, both in the scholarly world and among the general public, was understandable. On the one hand, there was the notion that Awlaki had joined the enemy in a war and that, like German Americans who had fought for the Nazis in World War II, he could expect no immunity based on his citizenship. But the face-off with Al Qaeda bore little resemblance to World War II, or indeed to any war in American history. So there was a bracing alternative analogy: that killing Awlaki would be like a justified police shooting of an armed and threatening criminal. The police shooting parallel was cited by Barron [Justice Department Office of Legal Counsel acting assistant attorney general] and Lederman [Justice Department Office of Legal Counsel deputy assistant attorney general] and was raised repeatedly by government officials who supported targeting Awlaki. “My view was Anwar al-Awlaki was actively plotting to kill American citizens,” said Gerald Feierstein, who was the American ambassador to Yemen during the hunt. “To me, he was like a guy walking down an American street carrying an M-16. The police would take him out.”

The Obama administration apparently took these concerns seriously and produced several legal memos which defended the legality of targeting al-Awlaki. Unsurprisingly, the administration sought to keep those memos secret but, due to leaks and court rulings, some redacted versions became public. Klaidman (2013, 215-216) provides a basic list of legal concerns the administration struggled with.

There was little doubt that Awlaki wanted to strike at his birth nation, yet could a group of anonymous security officials secretly reviewing highly classified evidence claim to be judge, jury, and executioner? Koh [State Department Legal Adviser] also worried

about reciprocity. Would the Russian or Chinese governments track down dissidents whom they viewed as terrorists and take them out on the streets of Washington, DC, or Paris with their own drones? And Koh was skeptical of some of the counterterrorism community's conclusions about Awlaki. He had seen how quickly intelligence analysts would elevate a propagandist to an operator. Or how they used fudged terms like "facilitator" to imply that suspected militants represented grave threats to the United States. What was a facilitator? A driver? A chef?

Al-Awlaki was born in Las Cruces, New Mexico in 1971 when his Yemeni father studied at New Mexico State University. After having spent the first eleven years of his life in the US the al-Awlaki family returned to Yemen but Anwar moved back to America in 1991 in order to attend college. Subsequently, against his initial plans, al-Awlaki decided to become a Muslim cleric. In the aftermath of the September 11 attacks, he became "a national media star" known for his moderate views on Islam, showing no indications of preaching the use of violence (Shane 2015, xiii). Later on, however, al-Awlaki radicalised and attracted the attention of US law enforcement agencies. In particular, his dual identity as being both American and Yemeni made him dangerous according to counterterrorism officials (2015, 215). Al-Awlaki was able to give charismatic Internet sermons in colloquial English and had "an intuitive grasp of American culture" (2015, 174). After a stay in the UK where he continued to preach he eventually moved to Yemen where he joined AQAP. At first, US agencies considered him to be an inspirational, not an operational leader. In fact, according to Scahill (2013, 360), there was no consensus about the type of threat al-Awlaki posed: "During this time, Awlaki began to achieve almost mythical status in the US media and government narrative on terrorist threats. But the real question was how big a threat he *actually* posed. Although the dispute did not play out publicly, there was deep division in the intelligence community over how to approach Awlaki." Reportedly, as late as October 2009, the CIA had concluded that it did not have the evidence to support a capture-or-kill operation against al-Awlaki (Ignatius 2010). Having said that, however, his publications were often found with terrorism suspects arrested in the United States and al-Awlaki was also proven to have been in email contact with

Nidal Hassan, a US army major who would later kill thirteen people in a mass shooting at Ford Hood, Texas. Interrogations found that while al-Awlaki had not been involved in the planning of the attack, the contact between him and Hassan might have contributed to his radicalisation (Shane 2015, 11). In his inspirational role, the administration considered him to have taken on the role previously held by Osama bin Laden. As Shane (2015, 26-27) notes:

Bin Laden's place in history was secure, but that was the point – his place was in history. In the years immediately after 9/11, the world had anxiously attended to his messages. But by the decade's end he had the slightly pathetic sound of an aging pop star, well past his prime but still pretending to popularity. By contrast, Anwar al-Awlaki, fourteen years younger, was the rising idol, preaching an ideology indistinguishable from Bin Laden's but in refreshingly blunt, clear and informal style. His usual choice of English limited his influence in the Arab world, but it gave him the same international appeal that made Apple and Toyota borderless brands.

Later, however, according to the mainstream account, al-Awlaki also took on an operational role, recruiting and actively plotting attacks against the United States as AQAP's chief of external operations. Jones (2012, 437) considers him to have "fueled" what he calls the "third wave" of Al Qaeda, its spread in the Arabian Peninsula between 2007 and 2009. As Mazzetti (2013, 304-305) reports, John Brennan, one of Obama's key advisers on counterterrorism, believed that al-Awlaki was responsible for AQAP's shift from focusing on attacking Saudi Arabia to also attacking the US. In that function he had instructed, besides others, the so-called Christmas Day plot in 2009. In that plot, which did not succeed, the Nigerian citizen Umar Farouk Abdulmutallab attempted to bring down Northwest Airlines Flight 253 from Amsterdam to Detroit by detonating a bomb hidden in his underwear. As the interrogation of Abdulmutallab brought to light, he had been attracted to the jihadi cause by listening to al-Awlaki's lectures and reading his writings. In 2009, he went to Yemen and established contact with al-Awlaki. Apparently willing to take part in a suicide mission, Abdulmutallab was approved by al-Awlaki to carry out the airline

plot. When Abdulmutallab was tried al-Awlaki's direct involvement in the attack came to light.

While Abdulmutallab's training and indoctrination unfolded, he said, al-Asiri [AQAP's chief bomb builder] built the underwear bomb, ultimately giving it to him in person and having him practice pushing the syringe that was supposed to lead to its detonation. Meanwhile, al-Awlaki instructed Abdulmutallab to make a martyrdom video, to be released after the attack, explaining who he was and why he had carried out the operation. The court filing asserted that al-Awlaki made the arrangements for a "professional" camera crew and helped Abdulmutallab write the statement. (...) The Justice Department said that al-Awlaki left it up to Abdulmutallab to choose the flight – so long as it was a United States airliner – and the date of the attack. But the cleric told him not to travel directly from Yemen to Europe. Abdulmutallab ultimately departed Yemen for Ethiopia, traveled to Ghana, returned to his native Nigeria, and only then flew to Amsterdam, where he boarded the flight to Detroit.

Al-Awlaki's "last instructions" to Abdulmutallab, according to the court filing based on his interrogations, "were to wait until the airplane was over the United States and then to take the plane down." (Savage 2015, 90-91)

Scahill (2013, 318), one author who at times parts with the mainstream account, has put forward a less clear-cut picture of al-Awlaki's direct involvement in the plot. Scahill notes that al-Awlaki only referred to Abdulmutallab as one of his "students" and that tribal sources in Shabwah told him that al-Awlaki was contacted by Al Qaeda members to provide Abdulmutallab with religious counselling but had no involvement in the plot. In addition, al-Awlaki himself had denied having been involved in the conception or planning of the attack. Generally speaking, Scahill is more cautious in allocating an operational role to al-Awlaki.

While US media outlets, terror "experts" and prominent government officials were identifying Awlaki as a leader of AQAP, those allegations were dubious. Awlaki had entered dangerous territory in openly praising terrorist attacks on the United States and calling for Muslims in America to follow the example of Nidal Hasan. But the available evidence regarding al Qaeda's relationship with Awlaki in 2010 suggests that Awlaki was not an operational member of the group but was seeking out an alliance with like-minded individuals. Some, like his uncle, even argued that he was pushed into an alliance with AQAP after he was marked for death alongside its leaders. (2013, 361) (...)

Awlaki was undoubtedly developing an affinity for al Qaeda's principles – and his public remarks were becoming indistinguishable from the pronouncements of al

Qaeda. Still, words are not actions. To former DIA analyst Joshua Foust, it appeared as though some within the US intelligence community were elevating Awlaki's status based on the fear he was able to inspire through his words. Although he found Awlaki's praise for al Qaeda and calls for terrorist attacks against the United States reprehensible, Foust did not believe these statements constituted evidence of a senior operational role in al Qaeda. "Within AQAP itself, he's literally middle management," he told me at the time. "Even the AQAP leadership treats him like he's just a subordinate, who needs to shut up and do what he's told." Foust added: "I think a lot of the focus on Awlaki doesn't make any sense, because we assign him a kind of importance and influence that he doesn't really have."

After the Christmas Day bomb plot, the White House changed its tune on Awlaki, claiming he had gone operational, with some officials comparing him to Osama bin Laden. "I think it's an exaggeration, frankly, to think he is necessarily a new bin Laden," Nakhleh, the former senior CIA officer, told me. "We would not have even thought much about him if it weren't for Abdulmutallab, the underwear bomber."

Although Awlaki was developing relationships with various al Qaeda figures in Shabwah and elsewhere, and his status was rising within its ranks, well-connected Yemenis who had interviewed AQAP leaders told me that he was not an operational member of the group. "Anwar al Awlaki was not a leader in al Qaeda, he did not hold any official post at all," said journalist Abdul Rezzaq al Jamal. He told me that AQAP viewed Awlaki as an ally and that "the thing that united him and al Qaeda is the hostility to the US." Awlaki "agrees with al Qaeda in vision, rationale and strategies. The efforts that were made by Awlaki in the framework of AQAP's work, especially in terms of recruiting in the West, were very big." (2013, 362-363)

In contrast to Scahill's sceptical reporting, the mainstream account does not only argue that the cleric was the mastermind behind the Christmas Day plot but, in addition, that he was permanently trying to find a way to attack the United States. As Klaidman (2013, 262) notes:

There had been the Christmas Day plot, which had come perilously close to succeeding. Then, in October 2010, AQAP had managed to put improvised bombs – ink toner cartridges filled with explosive material inside HP printers – on cargo planes headed to the American homeland. (...) Over the summer of 2011 Obama was regularly updated on a particularly diabolical plan that AQAP's master bomb builder, Ibrahim Hassan Tali al-Asiri, was devising. The intelligence indicated that AQAP was close to being able to surgically implant bombs in people's bodies. The wiring was cleverly designed to circumvent airport security, including metal detectors and full-body scanners. AQAP's terror doctors had successfully experimented with dogs and other animals. Obama and his advisers were in a race against time to kill Awlaki.



Furthermore, Klaidman (2013, 216) reports that Koh, when looking at the evidence against al-Awlaki, read “about multiple plots to kill Americans and Europeans, all of which Awlaki had been involved in at an operational level. There were plans to poison Western water and food supplies with botulinum toxin, as well as attack Americans with ricin and cyanide. Awlaki’s ingenuity at coming up with newer, deadlier plots was chilling. Koh was shaken when he left the room. Awlaki was not just evil, he was satanic.” The Christmas Day plot in particular apparently hardened the Obama administration’s approach to counterterrorism (Savage 2015, 95). In response, the Obama administration decided to target him under the code name “Objective Troy.” As Shane (2015, 219-220) directly quotes decision-makers within the administration:

“If this had happened a year earlier in the administration, I think there might have been greater resistance – from State, potentially from Justice,” said Michael Leiter, who participated in the discussions as director of the National Counterterrorism Center. “But a year and a half in, whether it was Christmas Day or other events, you had a lot of people in the administration who were watching the streams of intelligence all the time and were recognizing the very real dangers. We’d had Fort Hood, which didn’t involve Awlaki directing things but did highlight how influential he could be. So after Christmas Day, I think a recognition had built up that we’re not going to do this willy-nilly, but there are some dangerous people out there who happen to be American citizens.” Leiter said the citizenship issue was thoroughly debated, but no one believed it should be an absolute shield for Awlaki. “The biggest question you are left with is, ‘Okay, what’s the alternative? Just let this guy keep recruiting people, keep training them, keep telling them things and putting them on airplanes and hope that we keep finding them?’”

There has been some controversy about when exactly the administration started to attempt killing al-Awlaki. Klaidman (2013, 264), for one, claims that Obama gave “oral approval” to kill al-Awlaki “as far back as December 2009.” Others (see, e.g., Scahill 2013, 313; Woods 2011; Roggio 2010) allege the US had already made the attempt to kill him in an airstrike on December 24, 2009. In consequence, that would mean al-Awlaki had been targeted for his inspirational role, rather than for any operational role. Savage’s account (2015, 230) disputes this allegation, arguing that, based on his interviews with multiple decision-makers, only after the Abdulmutallab

interrogation which demonstrated al-Awlaki's operational role had the administration decided to put him on the kill lists. Following Savage's account, reports as to when exactly al-Awlaki was put on the kill list vary. Reportedly (Priest 2010) he was put on the JSOC kill list in January 2010, which was followed by his addition to the CIA kill list on February 5, 2010 (Panetta 2015, 266-267).

As indicated above, there was considerable legal debate leading up to the decision to target al-Awlaki for death. Rather than giving an account of that debate, this discussion limits itself here to the administration's core rationale behind the targetability of al-Awlaki as narrated in Shane (2015, 221).

Awlaki could be legally targeted by the CIA and the military on the basis of the agency's conclusion that he posed "a continued and imminent threat" to the United States, said the memo, later released with heavy redactions after a lengthy court battle by *The New York Times* and the American Civil Liberties Union. Ordinarily, an "imminent" threat was the kind posed by a gunman pointing a loaded weapon at an innocent person. But Barron and Lederman evidently concluded that terrorists assumed to be plotting in secret qualified as an imminent threat, since requiring the government to wait until they acted was self-defeating. Because the evidence showed that Awlaki as a leader of AQAP was determined to attack the United States and was working relentlessly toward that goal, there was no requirement that the intelligence agencies know the details and timing of a specific plot. They could assume that an attack was always imminent.

Klaidman (2013, 261) reports that while US intelligence had been following al-Awlaki for years, after the successful targeted killing of bin Laden, Obama considered al-Awlaki as the main terrorist threat, more dangerous even than bin Laden's successor at the head of Al Qaeda, Ayman al-Zawahiri. Shane (2015, 224) elaborates on Obama's view of the al-Awlaki case:

More than once, aides said, Obama remarked on the strength of the evidence against Awlaki, which was highly unusual for a terrorist case. Of course, none of the evidence would be presented in court, subjected to cross-examination, or assessed by a jury of his peers. But Obama and his aides had the firsthand testimony of Abdulmutallab about Awlaki's role in the airliner plot; they had communications intercepted by the NSA that showed Awlaki plotting with other Al Qaeda members; and they had Awlaki's own public declarations that he considered it every Muslim's religious duty to kill Americans. The president considered that more than enough. "This," Obama told aides of the decision to target Awlaki for execution without trial, "is an easy one."

Obama also specifically asked for updates on al-Awlaki to be provided at every so-called “Terror Tuesday” meeting: “‘I want Awlaki,’ he said at one. ‘Don’t let up on him.’ (...) ‘Do you have everything you need to get this guy?’ Obama would ask” (Klaidman 2013, 261). Prior to the successful strike on September 30, which will be narrated shortly, there had been a strike on May 5, 2011 which al-Awlaki survived narrowly (Scahill 2013, 454-457). As was noted in the case of al-Majalah, in the initial phase of the Yemeni theatre, most strikes had been carried out by the US military. Likewise, the task of killing al-Awlaki had first been allocated to JSOC. In the summer of 2011, however, this task was turned over to the CIA. Klaidman (2013, 261-262) reports that the reason for this switch in targeting authority was “highly pragmatic:”

The United States had built a new drone base in a strategically located Persian Gulf country. It was a regime with which the CIA had far better ties than the military, allowing it to conduct sensitive operations from certain locations that were off-limits to JSOC. The Defense Department turned over as many as eight drones to agency operators so that they could keep a bigger presence focused on Yemen. Meanwhile, the Pentagon put additional drones into nearby Djibouti, finished construction on a base in Ethiopia, and transferred drones from there from the Seychelles. What was striking was that JSOC accepted the CIA’s primary role in the hunt for Awlaki without complaint. Like the bin Laden mission, it was an example of the near-seamless integration of counterterrorism operations between the military and the CIA, a hallmark of Obama’s war.

Shane (2015, 285), however, notes that there was something more behind this switch in lead authority. “But Obama was not happy with JSOC’s performance in Yemen: first, there were the bad strikes that had caused irreparable harm to the image of American counterterrorism efforts there, even among Yemenis who passionately hated Al Qaeda; and second, there was the Awlaki hunt – eighteen months and counting since the order to kill or capture, which really meant kill, and the job was not yet done.”

Leading up to the successful strike on September 30, US intelligence had managed to obtain crucial information about al-Awlaki’s “patterns of life.” Among the intelligence secured during the interrogation of a high profile capture was information

about al-Awlaki's travel and communication habits as well as about his usual security arrangements (Klaidman 2013, 263). Before US intelligence obtained this crucial information, it had tried to locate al-Awlaki using imaginative methods like, for example, a failed effort during which the CIA acted as matchmaker, sending al-Awlaki his third wife (Shane 2015, 253-256).

The actual mission which killed al-Awlaki has been narrated comprehensively by Klaidman (2013, 263-264).

In the end, Awlaki's demise was the result of several factors: a mosaic of intelligence the Americans were able to assemble with the help of Warsame [the interrogated person mentioned above], a tip from a Yemeni source, and a fatal lapse in operational security by the cleric. In September, US intelligence had tracked Awlaki to Al Jawf province, an al-Qaeda stronghold in northern Yemen. In a departure from his peripatetic ways, Awlaki stayed in the same house for two weeks. But he often surrounded himself with children, and the standing orders from Obama had always been to avoid collateral damage at almost any cost. In many previous instances Hoss Cartwright [Vice Chairman of the Joint Chiefs of Staff] would not even take a proposed operation up the chain to the president if there was a reasonable chance that civilians would be killed. But as the Americans were closing in on Awlaki, Obama let it be known that he didn't want his options preemptively foreclosed. If there was a clear shot at the terrorist leader, even one that risked civilian deaths, he wanted to be advised of it. "Bring it to me and let me decide in the reality of the moment rather than in the abstract," he said, according to one Obama confidant. "In this one instance," recalled the source, "the president considered relaxing some of his collateral requirements." But in the end Obama was never forced to confront that awful dilemma.

On the morning of September 30, after finishing breakfast, Awlaki and several of his companions left the safe house and walked about seven hundred yards to their parked cars. As they were getting into the vehicles, they were blown apart by two Hellfire missiles. (Also killed was Samir Khan, the Pakistani American propagandist for AQAP and editor of the terrorist organization's Internet organ, *Inspire*. Justice Department lawyers had told the military that they could not approve Khan's killing, but after officials learned he had died in the raid, Khan was deemed "acceptable collateral damage.")

The mission that killed al-Awlaki, like the bin Laden raid, was carried out under the authority of the CIA. However, providing another instance of the curious relationship between the CIA and the military when it comes to the authority to carry

out targeted killings, JSOC was also involved. “The drones were technically under the command of the CIA, though JSOC aircraft and ground forces were poised to jump in should the operation require their assistance. A team of commandos stood at the ready to board V-22 helicopters and take action. For extra measure, US Marine Harrier jets scrambled in a backup maneuver” (Scahill 2013, 500). With regard to the atmosphere among the drone operators who executed the mission so far one account has been put forward. According to T. Mark McCurley (2015, 333) the operation was carried out in an unemotional setting. “Months of tracking ended in a matter of seconds. There was little reaction in the operations center. No cheers. No high fives. The Task Force was too professional for that. Frog [nickname of one of the operators used to conceal his identity] and I shook hands. He was smiling. We were one team. We’d earned a victory, evident by the trucks smoldering in the monitor.”

Concerning the question whether al-Awlaki had been willing to surrender and defend himself in court his hiding as well as his rhetoric suggest the contrary. As Shane (2015, 43) reports: “(...) Awlaki stated flatly that he would not turn himself in to either Yemeni or American authorities, declaring that ‘justice is not open for negotiation.’ He was trusting his fate to a loftier authority, he said. ‘If the Americans want me, let them search for me,’ Awlaki said. ‘Allah is the best protector. If Allah, glorified and exalted be He, wants to rescue me from them, if they were to spend all what is on this earth, they won’t be able to get me. And if Allah predestined that my death be on their hands and the hands of their agents, then that would be my fate.’”

As far as legal prosecution is concerned, the US legal system does not allow a trial in absentia, but Yemen, in the aftermath of the failed printer cartridge plot, brought such a case against al-Awlaki, charging him for “forming an armed group to carry out criminal attacks targeting foreigners” (Shane 2015, 262). As the result of this trial, al-Awlaki was sentenced to ten years of imprisonment. This sentence, logically leads to the question whether it was, as the CIA concluded, infeasible to capture al-

Awlaki. It seems that political calculations were also part of that conclusion. On the one hand, as Shane (2015, 263) puts it, the Obama administration did not trust the Yemeni government and, moreover, did not consider it capable of capturing al-Awlaki. On the other, however,

The legal opinion justifying Awlaki's killing was premised on the notion that his capture was "infeasible." The word was absolute, but the reality was far more complicated. If American intelligence could find Awlaki in the wilds of Yemen, protected by a handful of bodyguards, it was clearly not inconceivable that a Navy SEAL team could cross the Saudi border in the middle of the night, surprise the encampment, and take Awlaki alive. Indeed, SEAL and Delta Force teams battle-hardened by years of raids in Afghanistan and Iraq might be said to specialize in the "infeasible." But such a mission would be hugely risky to the American commandos, could spark protests in Yemen, and might well end with Awlaki dead anyway, in the gunfight that would likely break out on the ground. "It was an option and it was extensively discussed," said a senior American official who knew Yemen well. "Can you come up with an op to capture? The answer everyone came up with was no. It was beyond Yemeni capabilities. And the blowback from a US operation would be too great." So there was a legitimate case that a capture mission was unwise, if not quite infeasible.

Scahill (2013, 391), again, provides a morally more suspect portrait of the US role regarding the Yemeni legal efforts. "Four days after the cargo bombs were discovered, Yemen indicted Awlaki in absentia on charges unrelated to the bomb plot. The official charge was "incitement to kill foreigners and members of security services." The judge ordered prosecutors to hunt down Awlaki and bring him to justice dead or alive. Regardless of the specific charges against Awlaki, it was clear that the indictment was coordinated with Washington and intended to give legitimacy to the continued targeting and potential assassination of Awlaki while placing responsibility once again on the Yemenis."

## **5.7 The Case of Abdulrahman al-Awlaki, Yemen, 14**

**October, 2011**

The case of Abdulrahman al-Awlaki seems to be connected to the targeted killing of his father, Anwar al-Awlaki. Abdulrahman who, like his father, held American citizenship was killed in a JSOC drone strike on October 14, 2011, two weeks after his father. The reason why he was targeted or whether he was even specifically targeted remains, due to government secrecy, a debated question up until the present day. One account, which one again might want to refer to as the mainstream account, holds that Abdulrahman had not been directly targeted in the strike and that he was “collateral damage” as he attended a meeting of alleged Al Qaeda members. Junod (2015) and Scahill (2013) have challenged that account, proposing the opposing narrative that Abdulrahman might have been the target of a preventive or a revenge killing. With regard to prevention, Junod implies that by killing Abdulrahman he would not be able to follow in the footsteps of his father. Regarding revenge, Scahill suggests the possibility that Abdulrahman was targeted for the crimes of his father.

Most of the controversy has in fact been about what Abdulrahman was doing at the strike site with whom. The immediate context of the killing of Abdulrahman al-Awlaki leads back to the final weeks of his father’s hiding in the mountains of Yemen. According to Junod (2015), the sixteen-year old Abdulrahman lived with his grandfather, Nasser al-Awlaki, in Yemen’s capital Sanaa. Abdulrahman had not seen his father Anwar for two years and because he missed him he decided, without informing anyone in advance, to make an attempt to find him, only taking his backpack with him. Before his father had gone into hiding, Abdulrahman had visited and lived with his father in the al-Awlaki family’s ancestral village close to the Arabian Sea several times. According to his aunt, whom Junod quotes, “Abdulrahman was very aware who his father was and knew that the U.S. government was trying to kill him.” On the morning of September 4, Abdulrahman was nowhere to be found having

left his grandparents' house through the kitchen window. His mother later found a note which explained why he had gone. According to Scahill (2013, 496), the note read as follows: "I am sorry for leaving in this kind of way. I miss my father and want to see if I can go and talk to him, (...) I will be back in a few days. I am sorry for taking the money. I will pay you back [He had taken the equivalent of \$40 from his mother's purse]. Please forgive me. Love, Abdulrahman."

The al-Awlaki family considered making an attempt to find Abdulrahman but because they feared that, in case the son had found his father, the Americans would discover Anwar's location and kill him. After a few days, the family was informed by relatives living in Shabwah province that Abdulrahman was with them and that he had not yet found his father, nor did he have an idea where he might be. As the above case established, Anwar al-Awlaki was hiding in the mountains of Jawf province. Scahill (2013, 499) describes the scene as follows:

(...) Abdulrahman arrived in Ataq, Shabwah. He was picked up at the bus station by his relatives, who told him that they did not know where his father was. The boy decided to wait in the hope that his father would come to meet him. His grandmother called the family he was with in Shabwah, but Abdulrahman refused to speak to her. "I called the family house and they said, 'He's OK, he's here,' but I didn't talk to him," she recalled. "He tried to avoid talking to us, because he knows we will tell him to come back. And he wanted to see his father." Abdulrahman traveled with some of his cousins to the town of Azzan, where he planned to await word from his father.

One day after Abdulrahman heard about the targeted killing of his father, according to Junod (2015), he informed his mother that he was coming home. He did not do this immediately, however, as the so-called Arab Spring caused political unrest at the time. Abdulrahman waited for about two weeks for the turbulences to settle down which would make his way back less risky. On the night of October 14, the day before he wanted to begin his journey back, a JSOC drone strike killed him as well as several others. Junod (2015) describes the strike scene as follows: "On that night, though, they were all celebrating Abdulrahman's last night in his ancestral village near the Arabian Sea. (...) he was saying goodbye to the friends he'd made. There were six



or seven of them, along with a seventeen year-old cousin. It was a night lit by a bright moon, and they were sitting around a fire. They were cooking and eating.” Scahill (2013, 507) provides a slightly different account:

Abdulrahman was mourning his father in Shabwah. The boy’s family members there tried to comfort him and encouraged him to get out with his cousins – to go for walks or go outside for meals in the fresh air. That was what Abdulrahman was doing on the evening of October 14. He and his cousins had joined a group of friends outdoors to barbecue. The boy and his cousins had laid a blanket on the ground and were about to begin their meal. There were a few other people nearby doing the same. It was about 9:00 p.m. when the drones pierced the night sky. Moments later, Abdulrahman was dead. So, too, were several other teenage members of his family, including Abdulrahman’s seventeen-year-old cousin, Ahmed.

The opposing account, in contrast, claims that Abdulrahman had not been with family members or friends but had in fact been attending a meeting of Al Qaeda members. In the aftermath of the strike news reports initially held that among those killed was Ibrahim al-Banna, an alleged leader of Al Qaeda, a report that was soon contradicted as al-Banna was proven to be still alive. Moreover, there were reports that incorrectly referred to Abdulrahman as being a twenty-one-year old, an assertion that his grandfather Nasser quickly proved wrong through the release of Abdulrahman’s birth certificate. As quoted in Junod (2015), Senator Carl Levin, at the time the chairman of the Senate Armed Services Committee who in this position received briefings on clandestine activities, said about the killing of Abdulrahman: “My understanding is that there was adequate justification. (...) It was justified by the presence of a high-value target.” The senator’s remarks are in line with the account that, contrary to Junod’s reporting, describe the strike that killed Abdulrahman as one based on faulty intelligence.

On the prowl in Shabwah at 9 p.m. on the evening of October 14, 2011, JSOC drone operators believed they had a legitimate Al Qaeda target, the Egyptian-born media chief for AQAP, Ibrahim al-Banna. They fired their missiles at a group of seven men eating by the side of a road. When the smoke cleared and the corpses were identified, word came from Yemeni tribal sources: al-Banna had not been present. Among the dead, along with some rank-and-file militants, were Abdulrahman al-Awlaki and his seventeen-year-old cousin, Ahmed Abdel-Rahman al-Awlaki. (Shane 2015, 294)

Claims that Abdulrahman himself had joined Al Qaeda were vehemently denied by his family. “‘He was a very sweet, very gentle boy,’ Nasser al-Awlaki later told some American visitors. ‘He was very slim – he was tall but very slim. He wore eyeglasses, he’s nearsighted, and to think that Abdulrahman would be part of Al Qaeda is really ridiculous. (...) He never carried arms in his life. He never learned to use a pistol’” (2015, 295).

Elaborating on his family’s denial of any Al Qaeda connection, Scahill (2013, 509-510) goes even as far as to suggest that Abdulrahman’s killing might have been a revenge killing based for his father’s misdeeds. He grounds his assertion on public statements by senior members of the Obama administration which deserve to be quoted in full.

The CIA claimed that it had not carried out the strike, asserting that the supposed target, Ibrahim Banna, was not on the Agency’s hit list. That led to speculation that the strike that killed Abdulrahman and his relatives was a JSOC strike. Senior US officials told the *Washington Post* that “the two kill lists don’t match, but offered conflicting explanations as to why.” The officials added that Abdulrahman was an “unintended casualty.” A JSOC official told me that the intended target was not killed in the strike, though he would not say who the target was. On October 20, 2011, military officials presented a closed briefing on the JSOC strike to the Senate Armed Services Committee. With the exception of the statements from anonymous US officials, the United States offered no public explanation for the strike. The mystery deepened when AQAP released a statement claiming that Banna was, in fact, still alive. (...) The Awlakis began to wonder if perhaps Abdulrahman was, in fact, the target of the strike.

Senate Majority Leader Harry Reid, one of the handful of US lawmakers who would have access on all intelligence on the strike, seemed to suggest that was the case when asked about the killing of the two Awlakis and Samir Khan. “I do know this,” he said on CNN, “the American citizens who have been killed overseas (...) are terrorists, and, frankly, if anyone in the world deserved to be killed, those three did deserve to be killed.” When asked specifically about Abdulrahman’s killing by my colleague, journalist Ryan Devereaux, Representative Peter King, who also sits on the Intelligence Committee, said, “I’m convinced, and I meet on a regular basis with General Petraeus and the CIA and also military leaders, that every attack that’s been carried out in Yemen and Afghanistan, anywhere the US has been involved, I believe that the United States had reason to carry them out and I support them,” adding, “I’m

satisfied they've done the right thing." Asked whether he had specifically reviewed the Abdulrahman strike, King replied, "Yeah, that would be a logical deduction. You're trying to get me in trouble." Despite Representative King's assertion that he had reviewed the case, he later falsely portrayed Abdulrahman as having been with his father when he was killed. "If the kid was killed when he was with him, that's the breaks," King said.

Robert Gibbs, Obama's former White House press secretary and a senior official in the president's 2012 reelection campaign, was also asked about the strike that killed Abdulrahman. "It's an American citizen that is being targeted without due process of law, without trial. And, he's underage. He's a minor," reporter Sierra Adamson told Gibbs, during a press gaggle after a presidential debate where Gibbs was serving as a surrogate for Obama. Gibbs shot back: "I would suggest that you should have a far more responsible father if they are truly concerned about the well-being of their children. I don't think becoming an al Qaeda jihadist terrorist is the best way to go about doing your business."

In contrast, the mainstream account holds that Abdulrahman had not been intentionally targeted and that the news about the botched strike caused serious uneasiness. As Shane (2015, 295-296) reports:

When John Brennan gave him the news, Obama was furious, instantly understanding that the killing of a teenager would taint the counterterrorism strikes in Yemen, undermining once again the claim that it was justified American self-defense or aid to Yemen against al Qaeda, which most Yemenis despised.

Obama, said one aide who spoke with him shortly afterward, considered the strike "a fuck-up" that was profoundly frustrating. "The nature of his anger was that we'd taken a ton of care around the Awlaki issue – painstaking legal analysis, many, many meetings, very deliberative decision making, to take this action that we recognized was a substantial action" – that is, targeting an American citizen, the aide said. "And none of that was manifested in the other strike." Obama asked for a report on what had gone wrong.

Shane (2015, 296-297) further holds that the possible explanation why Abdulrahman was targeted is less straightforward than the blend of preventive and revenge rationales alleged by the Junod and Scahill accounts.

There was an explanation of sorts, if not a fully satisfying explanation, for the mistake. At the time of his death, Abdulrahman had been in Shabwah for six weeks. Shabwah was infested with Al Qaeda members and supporters, and until September 30 the teenager would naturally have been asking among them for help and direction in reaching his father. According to multiple Yemeni and American sources, after

Abdulrahman heard that an American strike had killed his father two weeks earlier, he was both brokenhearted and angry, and he decided to join AQAP's fight against the Americans. "The son was there specifically to make contact with Al Qaeda," said an American official who read the intelligence reports before and after the strike.

Nasser al-Awlaki refused to believe that his kind-hearted grandson would even contemplate such a move. But the evidence to support the claims that the son had decided to try to avenge the father's death is considerable. First, Abdulrahman had remained in Shabwah for two weeks after learning that his father had been killed. In a phone call a few days before his death, he had promised his grandmother that he would return to Sanaa. While the chaos in southern Yemen certainly made travel difficult, the fact that the teenager had not started the journey home by October 14 suggests that he may have had other plans. Second, it would be both psychologically and socially understandable if Abdulrahman decided to cast his fate with AQAP. In Shabwah, he was surrounded by Awaliq tribesmen for whom revenge of a son for a father's murder would be not just acceptable but mandatory. And in the weeks in September when he was asking after his father, Abdulrahman had probably established contact with AQAP members who undoubtedly after September 30 would have urged him to join their fight. Third, a Yemeni journalist who acknowledges being supportive of AQAP and who is in regular contact with its leaders, Abdul Razzaq al-Jamal, reported that Abdulrahman had decided to cast his lot with Al Qaeda. After hearing of his father's death, Jamal wrote, Abdulrahman told the AQAP leader in the town of Azzan, "I hope to attain martyrdom as my father attained it." AQAP members called Abdulrahman "Usayyid," or lion's cub, a reference to the Arab proverb, "This cub is from that lion," Jamal wrote.

So it is entirely plausible, though the details are difficult to reconstruct, that Abdulrahman and his cousin were with a group that included Al Qaeda members when they were killed. But al-Banna, the Egyptian whom JSOC was purportedly targeting, was not among the dead – the United States would still be offering a reward for information on his location three years later – and the Al Qaeda connections of others killed in the strike remained uncertain. In part that reflects the difficulty of assessing where an individual is on a spectrum of "Al Qaeda ties." In the context of Yemen's tribal provinces, that vague term can include dedicated fighters who have sworn allegiance to the leader of AQAP, but it can also include men with brothers or cousins in Al Qaeda who themselves take no active part.

Abdulrahman, said one administration official who was briefed on the strike, "was certainly with people who we believed to be AQAP." That did not justify the killing of the sixteen-year-old, he said, but it explained how it happened.

A number of initial news reports of the strike, based on interviews with anonymous Yemeni and American officials, mistakenly gave Abdulrahman's age as twenty-one. Outraged, Nasser al-Awlaki countered the false reports by giving

reporters copies of Abdulrahman's birth certificate, showing he had been born in Colorado in 1995. The incorrect age raised a possibility that American targeters somehow had bogus information and really believed that Abdulrahman was a twenty-one-year-old Al Qaeda member. But several officials said the incorrect age was either an honest error or a clumsy after-the-fact falsehood intended to minimize the blunder. "That's a 'shit happens' kind of story," said another American official deeply involved in the counterterrorism campaign in Yemen about the strike. "We didn't know he was there."

Savage (2015, 280), comparable to Shane, reports that US intelligence did not know that Abdulrahman was present at the strike site and that he was not specifically targeted although intelligence assumed that he had in fact joined Al Qaeda and therefore had been present during the meeting of militants.

## 6 Liability to Small-Scale Force<sup>2</sup>

### Introduction

Within just war thinking, the expanded use of targeted killing after 9/11 caused considerable soul searching although, as Himes (2016) demonstrates, moral argument about this particular policy reaches back to the classical world. Most recently, debate about targeted killing has become part of the “war of ethics” as both Walzer (2016) and McMahan (2012a) have argued about the morality of this practice. This chapter demonstrates that the chasm between these two camps is not unbridgeable; the argument about small-scale force can partly reconcile both camps on substantive grounds. It will be argued that targeted killings should be ruled by an account of moral culpability in line with the punitive reading of St Thomas which, like revisionists, objects to parts of Walzer’s just war. The culpability account will be developed in conversation with McMahan’s account of moral liability to defensive harm. Consequently, Walzer’s legalist paradigm, due to its reliance on international law is not in the centre of attention.

Before starting, it makes sense to briefly consider the legal justification for targeted killing provided by the Obama administration which largely overlaps with the Walzerian argument. In defence of his administration’s conduct, Harold Koh (2010), at the time the chief legal advisor to the Department of State, named two legal rationales: the right of self-defence and the existence of an armed conflict between the United States and Al Qaeda and associated forces. Saving the self-defence rationale for the later discussion it must be noted that the legal argument regarding the existence of an armed conflict contrasts markedly with moral liability or culpability accounts. Following from the armed conflict justification, terrorists are targetable

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<sup>2</sup> Parts of this chapter have been published in Braun, Christian Nikolaus. 2018. “Pope Francis on War and Peace.” *Journal of Catholic Social Thought* 15 (1): 63-87.

because of group membership. Consequently, questions of moral liability or moral culpability play no or only a secondary role in the decision to kill a member of the group. The Walzerian just war takes this justification as its point of departure. Walzer (2016, 13) upholds the rule that a state's military leaders are legitimate targets of targeted killing while political leaders are exempt. He subsequently suggests that this distinction should be maintained for insurgent organisations but rejects it for terrorist groups. If reasonable, Walzer argues, the state should capture alleged terrorists and take them to court. If unreasonable, however, they become liable to targeted killing. Rejecting the armed conflict justification, this chapter seeks to determine under what circumstances a person can become liable to targeted killing.

In terms of outline, the chapter introduces St Thomas's two remaining just war criteria of just cause and right intention. Having provided this theoretical basis, the chapter investigates the cases casuistically in light of the Angelic Doctor's criteria. Regarding just cause, it turns out that, depending on one's reading of the cases, either the maxim of defence or the maxim of retribution seems to have ruled the cases. Consequently, the analysis investigates under which circumstances the criterion of just cause for targeted killing can be met. What emerges is an account that accepts two just causes, defence and retribution. With regard to right intention, the chapter provides a discussion of the practice of targeted killing based on the moral virtues as presented by Aquinas. Again going through the cases, the analysis investigates the interplay of the virtues and how they should govern the passions which inevitably arise in war. The chapter concludes that, beyond the uncontroversial just cause of self-defence, retributive targeted killings can be morally justifiable in principle, but, due to prudential and charitable concerns, the bar for such operations is very high and, consequently, they are highly unlikely to be justifiable in practice.

## 6.1 Aquinas on Just Cause and Right Intention

While the culpability-based reading has historically been the dominant take there has also been a divergent interpretation of the Thomistic just war which interprets the Angelic Doctor in terms of moral liability. As Reichberg (2017, 142-172) points out, St Thomas's formulation of just cause historically led to two clashing interpretations. One, most influentially advocated by Thomas Cajetan, considers a just war as an instrument of retribution flowing from desert; as "an instrument of punishment, just war supposes subjective guilt on the part of the wrongful belligerent." The other, originating with Francisco de Vitoria and suggested by Luis de Molina, imagines a just war in terms of liability, as "a means of overturning an objective wrong, just war prescind[s] from determinations of subjective guilt" (2017, x). The culpability-based conclusions of this chapter are thus one possible reading of Aquinas, but not the *only* possible reading.

As noted earlier, during the Middle Ages, the common use of the term for war (*bellum*) referred to any internal or external use of force by a sovereign authority. The term *bellum* was neutral; its employment could be just or unjust. Private uses of force (*duellum*), however, could not rise to the level of war (Johnson 2014, 31). In consequence, the debate about the possibility of a "war" against terrorism which helped cause the emergence of *jus ad vim* would not have caused much concern during the days of St Thomas. While the ruler as sovereign authority could wage war against individuals, individuals did not have this right against the political community. Moreover, it is important to note that, in contrast to today's legalist paradigm, Aquinas did not make a distinction between defensive and offensive uses of force. St Thomas effectively distinguished between two forms of just war, war as defence of the common good and war as punishment. Crucially, in contrast to many contemporary just war thinkers who treat just war criteria in a "check-list" manner (Orend 2013, 111), moving from one criterion to the next without giving due attention



to the interplay of individual criteria, the Thomistic just war criteria are inherently inter-connected. Just cause and right intention in particular must be seen holistically.

As a result, while this chapter provides separate sections for each criterion, its argument for just cause for targeted killing rests on prudential considerations which generally fall under right intention. With regard to just cause, rationales of defence and retribution as flowing from the ruler's responsibility to maintain and establish justice will be considered. Regarding right intention, the cardinal virtues, especially prudence and fortitude, and the highest of all virtues, the theological virtue of charity, will function as maxims.

### **6.1.1 The Criterion of Just Cause**

St Thomas (ST, II-II, q. 40, a. 1) defines just cause as follows: "Secondly, a just cause is required, namely that those who are attacked, should be attacked because they deserve it on account of some fault." Put differently, war aimed "to restore a peace that has been disrupted (or threatened) by a particularly egregious wrong" (Reichberg 2017, 9). In the words of an influential commentator of St Thomas, Aquinas's just war served the function of "vindictive justice" (Vanderpol 1919, 250). Finnis (1998, 284) compares Aquinas's conception of just cause to a "cause of action" as employed in the US legal system: "a wrong giving ground for complaints and just claims for redress." The classical Christian idea of just war parallels a father's loving punishment of his errant son and is thus conceived as in line with the commandment of love of neighbour (Luban 2012, 308). This formula, upheld by Aquinas, has mostly been discounted today as "absurd," as "an unsupported assertion, a dogma" (2012, 308). Naturally, this understanding of just war contrasts with a rationale for war that exclusively relies on self-defence. Such an account would consider the preservation of individual lives as fundamental, whereas Aquinas's punitive conception stressed the common good (Kaplan 2013, 238).

Generally speaking, St Thomas had less of “a unified ethics of killing and more a two-fold ethics for private and public killing” (Murphy 2012, 178). Following from this distinction, the defence of the community was a rationale flowing naturally from the understanding of the responsibilities of government, namely to maintain order against internal wrongdoing and external attack (Johnson 1999, 48). As a result, a just cause for war, for St Thomas, “meant one or more of three possibilities: that the use of force in question was for defense against wrongful attack, retaking something wrongly taken, or punishment of evil” (1999, 29). Following from St Thomas’s definition of just cause, the retributionist take holds that “(...) for St. Thomas the *attack* described in his account of just cause is undertaken by the agent in question (soldiers acting under the command of a prince) precisely to *punish* the *culpable offense* of the passive belligerent. To be the target of a just war is to suffer an evil of punishment (*malum poenae*) in retribution for the commission of an evil of sin (*malum culpae*). Just war is thus punitive in its essence; retribution is the end to which it is specifically ordered” (Reichberg 2017, 150).

Parting with the historically dominant retributionist interpretation of Aquinas, revisionist thinkers embrace a liability reading. McMahan (2009), for example, suggest a rights-based liability account. This particular conceptualisation is rights-based because it claims that a person liable to attack “would not be *wronged* by being attacked, and would have no justified complaint about being attacked” (2009, 8). In a nutshell, McMahan (2009, 156) argues that liability to defensive force refers to “the extent to which a person is excused for posing a threat of wrongful harm” and that this “affects the degree of his moral liability to defensive harm, which in turn affects the stringency of the proportionality restriction of defensive force.” Following from that, McMahan (2009, 159-175) develops a spectrum of wrongful threats who are liable, to a varying extent, to defensive uses of force: culpable threats, partially excused threats, excused and innocent threats, and justified and just threats.

Importantly, McMahan makes an effort to distinguish his moral liability account from an account based on moral culpability. As he (2005a, 386) points out “Liability is different from desert. The claim that someone deserves to be killed implies that there is a reason to kill her even if it is possible for no one to be killed; but the claim that someone is liable to be killed has no such implication. Liability is the broader notion: desert implies liability but liability does not imply desert. Thus, if a person deserves to be killed, it follows that he is liable to be killed, but he can be liable to be killed without deserving to be killed.” In addition, McMahan (2009, 8) points to the distinction between the instrumental and non-instrumental nature of the concepts:

Desert is noninstrumental. If a person deserves to be harmed, there is a moral reason for harming him that is independent of the further consequences of harming him. Giving him what he deserves is an end in itself. Although a deserved harm is bad for the person who suffers it, it is, from an impersonal point of view, intrinsically *good*. By contrast, a person is liable to be harmed only if harming him will serve some further purpose – for example, if it will prevent him from unjustly harming someone, deter him (or perhaps others) from further wrongdoing, or compensate a victim of his prior wrongdoing. The goal is internal to the liability, in the sense that there is no liability except in relation to some goal that can be achieved by harming a person.

Following from the instrumental nature of liability, McMahan (2009, 9) notes that the requirement of necessity is inherent to it. Moral culpability, however, is not ruled by necessity “since the value of a person’s getting what he deserves is not instrumental and hence is not necessary for anything beyond itself.” McMahan’s account, in contrast, holds that once a person has been found to be morally liable to defensive force that force must still adhere to the principles of necessity and proportionality (2009, 10).

In contrast, the culpability account of liability considers the criterion of liability to be that of culpability for an unjust threat. Generally speaking, it is possible to distinguish between a narrow and a broad version of the culpability account. This chapter focuses on the broad version which holds that culpable responsibility for an

unjust threat determines liability to defensive force. In contrast to the narrow account which only allows for the actual attacker to be targeted, the broad account holds that “a person may be liable to killing now if that is necessary to avert an unjust threat for which he is responsible through past culpable action, even if he is now no part of the threat” (McMahan 2005a, 390). McMahan (2005b, 7) criticises St Thomas’s just cause in this regard for being “too narrow” while generously conceding that the Angelic Doctor was “close to the truth.” According to McMahan, Aquinas’s desert-based account is too narrow because St Thomas held that it is necessary that those who are attacked deserve it on account of some wrongdoing. Following from that, the culpability account of liability is more restrictive regarding the use of force as the liability account “can extend beyond culpability for an unjust threat” (McMahan 2005a, 392). In consequence, the culpability account, in contrast to the liability account, does not allow the intentional use of force against what McMahan (2005a, 393) labels innocent or non-responsible threats.

Interestingly, McMahan (2005b, 7) states that his reasoning refers back to the classical just war. And, in fact, his emphasis of *ad bellum* concerns over *in bello* questions is more in line with Aquinas’s just war than, let’s say, Walzer’s conceptualisation. At the same time, however, McMahan’s thinking deviates from classical just war thinking in that he makes no distinction between killing in war and killing in everyday life (2009, 158). In other words, Aquinas’s careful distinction between public and private employments of force is of no concern for McMahan. Moreover, McMahan’s sole focus is on defensive killing. He explicitly states (2005a, 386) that he will not consider retributionist rationales. In a later piece, McMahan (2012a) has upheld this stance with regard to targeted killing. He is thus very much relying on the modern legalist paradigm with its stress on self-defence as the only just cause. In a way this seems quite surprising as McMahan’s analytical philosophy takes pride in illuminating issues from different angles and in great detail.

Specifically looking at McMahan's understanding of culpability, his conceptualisation emerges as an ideal-type version which, at times, is hard to reconcile with St Thomas's idea of culpability. For example, the Angelic Doctor is in fact able to justify the killing of innocent and non-responsible threats through his idea of non-intentional killing which later became known as the doctrine of double effect. If it is necessary to defend against an unjust attack, even if that attack is carried out by innocent or non-responsible threats, Aquinas would allow such action if the intent is not the killing of the wrongdoer but the stopping of the attack. As Finnis (1998, 276) explains St Thomas's thinking on this issue:

Have I then no right to resist the vicious or insane killer's attack? On the contrary, I can rightly resist the attack, preserving myself (or one or more others) by using whatever means are reasonably necessary for, and part and parcel of, repelling it. I do not lose this right just because I can foresee that these means will probably or even certainly have as their side-effect the assailant's death. For in doing what I do, I need not – and must not – be intending to kill (or indeed to harm). I can – and should – be intending and choosing no more than to do what it takes to stop the attack [repellendi iniuriam]. That is the object [obiectum; finis] or purpose of my acting; and the effect on my assailant's life is a side-effect, outside the intention [praeter intentionem] or set of intentions from which the action gets its *per se* character as morally accessible act.

Apart from this difference, there is also considerable overlap between McMahan's idea of liability and Aquinas's culpability account. In the same way that McMahan thinks about a varying liability to defensive harm, St Thomas holds that unjust attackers are morally culpable to different extents. As Reichberg (2017, 232-233) points out, culpability can also be a matter of degree: "The underlying assumption is that all who perpetuate a wrong are corporately responsible for that wrong, although obviously in unequal degrees, as he who initiates a wrong (the prince) is held to a much higher standard than those (abettors, i.e., subjects) who merely (yet freely, as they could have refused their consent) execute the wrong at his command."

### ***Aquinas's Punitive Just Cause***

Commonly, most critics of punitive uses of force discuss various ends beyond retribution as, for example, deterrence and rehabilitation (see, e.g., Lang 2005, 53). Aquinas, too, as Finnis (1998, 279) points out, has a place for these rationales in his general theory of punishment. However, while the use of lethal force might, for example, also be imagined for deterrence purposes, this thesis, more narrowly, focuses on the retributionist aspect of punishment as it had been the “core” (Murphy 2012, 178) of Aquinas’s punishment theory. For St Thomas, “In punishment precisely as retribution, the restriction, pain, or other loss is chosen as the suppression of the offender’s will (which was indulged in the offence), and that suppression is not a mere means to some future good but rather is itself a good: the restoring of the order of justice disturbed in the offence. The choice to impose punishment is, then, ‘referred to’ the common good of justice, and as such is the choice of a good (and not of a bad as a means to that good)” (Finnis 1998, 279).

As Calvert (1992, 272-273) notes, St Thomas’s account shows all main features of retributivism: Aquinas generally holds that a crime deserves to be punished and in order for that punishment to be just, a crime must actually have taken place and the criminal suspect must have committed the misdeed. In addition, the wrongdoer must have been a responsible agent at the time he committed the crime. These last two aspects are supposed to ensure that only the guilty are punished. Crucially for the later discussion, St Thomas also argues that besides the magnitude of the crime, the “degree of sinfulness” measured as the amount of voluntariness by which the crime was committed by the perpetrator must be taken into consideration when it comes to deciding which penalty to impose (1992, 272). Furthermore, Aquinas’s account of retribution holds that crime and punishment must be proportionate, meaning “that less serious crimes receive less severe penalties and that more serious crimes receive more severe penalties” (1992, 273). Last but not least, Aquinas follows retributive

theories in the assumption that a crime causes an imbalance in the order of justice which a justly imposed punishment aims to correct. Aquinas's thought about punishment is the result of his natural law approach. Directly following from natural law's metaphysics of the good natural law theorists consider retribution "not only a legitimate end of punishment," but "the *fundamental* end" (Feser and Bessette 2017, 46).

Once war as punishment takes the form of lethal action, inevitably the parallel with capital punishment comes to mind. And, in fact, Aquinas's just war has been compared to the imposition of the death penalty executed by the sovereign as part of her function as judge who has been instituted by God. For example, Finnis (1998, 285-286), although he himself rejects Aquinas's thinking in this regard, argues that the Doctor of the Church "highlights the analogy with punishment – capital punishment – and downplays, without eliminating, the analogy with private defence of self or others. Just as capital punishment involves the intent to kill, so too [he thinks] does waging war as ruler, general, or soldier." Murphy (2012, 177), even more directly, argues that, for the Angelic Doctor, "killing in war derives its justification from the specifically public authority of the state to kill convicted criminals." Undergirding the parallel between capital punishment and war is Aquinas's understanding of sovereign authority. As Beestermöller (1990, 71-72) notes, only through her function as superior judge does the sovereign have the right to make judgements about the justice or injustice of acts which is the prerequisite of waging war licitly. In St Thomas's (ST, II-II, q. 66, a. 8) own words: "As regards princes, the public power is entrusted to them that they may be the guardians of justice: hence it is unlawful for them to use violence or coercion, save within the bounds of justice—either by fighting against the enemy, or against the citizens, by punishing evil-doers: and whatever is taken by violence of this kind is not the spoils of robbery, since it is not contrary to justice." Moreover, with regard to the sovereign's authority to employ lethal force Aquinas (ST, II-II, q. 64, q.

5) holds that: “One who exercises public authority may lawfully put to death an evil-doer, since he can pass judgment on him.”

Consequently, in order to determine the justness of a targeted killing the question of whether the crime under investigation deserves the death penalty will have to be answered. This chapter must thus engage the natural law argument for the justness of the death penalty in principle which Feser and Bessette (2017, 52) summarise as follows:

1. Wrongdoers deserve punishment.
2. The graver the wrongdoing, the severer is the punishment deserved.
3. Some crimes are so grave that no punishment less than death would be proportionate in its severity.
4. Therefore, wrongdoers guilty of such crimes deserve death.
5. Public authorities have the right, in principle, to inflict on wrongdoers the punishments they deserve.
6. Therefore, public authorities have the right, in principle, to inflict the death penalty on those guilty of the gravest offenses.

Importantly, as Calvert (1992, 261) notes, Aquinas’s thinking on the death penalty does not constitute a consistent account. In particular, St Thomas does not see the death penalty as a cure all. While he believes “that some people are incapable of reform, and that such people pose too great a danger to public well-being to be permitted to live” (1992, 279), his overall concern is not the imposition of punishment as an end in itself. Rather, for Aquinas, retributionism is subordinate to the public or individual good (1992, 266-269). As a practical consequence, he can imagine less severe penalties in cases where the death penalty would endanger the commonweal or where individuals are repentant. Having said that, however, it must be noted that the gravity of the crime committed, for Aquinas, is an indicator of the willingness to reform. In other words, repentant killers cannot simply evade capital or other types of punishment. In consequence, it makes sense to argue that the natural law approach to the death penalty can distinguish between its justness in principle and prudential and charitable questions concerning whether the punishment should actually be executed (see, e.g., Feser and Bessette 2017).



While undertaking this analysis, the issue of time will be of considerable importance. Traditionally, theorists have distinguished along temporal lines between defensive, punitive, and preventive modes of warfare. “Defensive warfare aims to repulse ongoing or imminent acts of aggression in the present, whereas punitive warfare (...) responds to past acts of aggression or ‘wrongdoing’, and preventive acts, of course, aim to thwart threats of future aggression” (Kaplan 2013, 236). St Thomas, however, does not allow purely preventive war. Although he never discussed the topic of anticipatory military action, Reichberg (2017, 203) points out how, for Aquinas, liability to attack depends on a prior determinable fault: “Attacking a party for what it *might* do, rather than what it has *already done*, would appear to contradict Aquinas’s fundamental premise that there is just cause for war only when ‘those who are attacked deserve attack on account of some fault.’” Having said that, however, following the concept of “*inchoate* wrongdoing,” St Thomas allows pre-emptive action, granting permission “to target wrongful actions that have been concretely planned, but whose accomplishment is still in the future” (2017, 203-204).

### **6.1.2 The Criterion of Right Intention**

As Whetham (2011, 72) argues, the principle of right intention does not “necessarily sit well with us today” as it might be considered abstract and subjective due to its “internal character.” Right intention, for Aquinas, concerns “the social act of undertaking war. This intention is revealed by the concrete war aims sought as goals in a war, and by the actions undertaken to realize these goals. Right intention, therefore, gives concrete shape to the condition of just cause” (Boyle 2003, 164). Russell also (1975, 269) detects an inherent connection between the principles of just cause and right intention: “The just cause constituted some fault or sin committed by an adversary that needed to be punished, and the right intention was to suppress injustice, return the situation to order and assure peace.”

According to Johnson (1999, 32), the classical conception of right intention has both negative and positive meanings. In terms of negative aspects, he (1999, 33) quotes St Augustine's call, which Aquinas embraced, to avoid bad intentions or motivations: "The passion for inflicting harm, the cruel thirst for vengeance, an unpacific and relentless spirit, the fever of revolt, the lust of power, and such like things, all these are rightly condemned in war." With regard to positive right intention, again quoting St Augustine: "True religion looks upon as peaceful those wars that are waged not for motives of aggrandizement or cruelty, but with the object of securing peace, of punishing evil-doers, and of uplifting the good." In a further reference, Johnson (1999, 33) quotes the Bishop of Hippo as follows: "We do not seek peace in order to be at war, but we go to war that we may have peace." St Thomas incorporated these Augustinian precepts into his just war thinking.

Importantly, as Johnson (1999, 33) notes, St Augustine's formula of right intention had been employed as a means to prevent soldiers from fighting with wrong intentions. Aquinas, going one step further, linked right intention directly to the criterion of authority of those who send the soldiers to war, thus tying right intention "especially closely" (1999, 33) to the objectives of justice and winning peace. St Thomas's understanding of right conduct in war follows from this notion. As Johnson (1999, 50) explains: "Thus Thomas comments further: 'Those who wage war justly aim at peace, and so they are not opposed to peace, except to the evil peace' – that is, the tyrannical order that is imposed by the unjust. The aim of peace, he continues, also implies care in the way force is employed even against those who deserve it (...)" According to Johnson's interpretation (1999, 50), for Aquinas, right conduct during war is inherently connected to the "virtuousness of its purpose" and to the virtuousness "of those who fought in accordance with that purpose." This way of reasoning implies restrictions on conduct in war, but Aquinas did not develop detailed rules as, for example, were present in the code of chivalry. It also explains why Aquinas did not develop what Johnson calls the "prudential tests" (1999, 34) of just

war thinking. Today's *jus ad bellum* commonly accepts Aquinas's three "deontological requirements" (1999, 34) of sovereign authority, just cause, and right intention plus the prudential criteria of overall proportionality, last resort, and reasonable hope of success. For St Thomas, these prudential criteria, although important, were subordinate to the deontological ones and, in addition, came naturally if one fought with right intention.

Elaborating on the methodology chapter's brief introduction, "the virtues are those dispositional character traits that allow us to act rightly" (Cole 1999, 59). Virtue is enacted by performing acts which are virtuous. In order to know what is virtuous and thus become capable of acting virtuously oneself, one has to rely on truly virtuous exemplars. In other words, virtuous behaviour needs training. For St Thomas, moral virtue is expressed in the ability to perform good acts repeatedly. Confronting situations that require instantaneous reaction, it is essential that a person's passions are correctly ordered in accordance with the virtues. When the training in virtuous behaviour succeeds, it becomes natural for the virtuous person to subject his or her quick reactions to habit, not instinct (1999, 59-62). Simply put, a truly virtuous person does not need a fixed set of rules but will react appropriately as a matter of habit. If a person's soul is rightly ordered through the virtues, if one's soul is at peace in other words, one's actions will naturally serve the common good (Gorman 2010a, 252).

Given that St Thomas was first and foremost a theologian his just war thinking cannot be separated from his Christian faith. Thus, Aquinas distinguishes between the cardinal virtues of justice, prudence, fortitude and temperance, and the theological virtues of faith, hope, and charity. The most basic difference between these two types of virtue is that the cardinal virtues provide the necessary foundation for human action on earth, for imperfect happiness, while the theological virtues point mankind to its supernatural end of beatitude, or perfect happiness (Schockenhoff 2002, 244).

For the purpose of this chapter the cardinal virtues of prudence and fortitude and the theological virtue of charity are the most important ones. Crucially, this is not to say that the other virtues are insignificant. Aquinas operated from the doctrine of the unity of the virtues which holds that for true moral action, all the virtues must be exhibited. Having said that, the cardinal virtues like prudence and fortitude are transcended by the theological virtues as they lead human beings to their final end which is unity with God (Gorman 2010a, 255). It is this particular aspect that Johnson seems to de-emphasise in his secular reading of Aquinas. In Pope's (2002, 50) words: "The deepening of our humanity proceeds through the graced process of becoming more and more like God, in whose image we have been created." The most important theological virtue in this process is the virtue of charity. It is through charity that human beings can accomplish the final goal of their existence and it is the only virtue that continues to exist in heaven (2002, 38). For Aquinas (ST, I-II, q. 62, a. 4), "Charity is the mother and root of the virtues, inasmuch as it is the form of them all." In other words, charity is the "capstone virtue of the ethical life since it perfects and completes all of the other virtues" (Gorman 2010a, 256). Relevant to questions about when to refrain from using force although it would in principle be justified, "The primary act of charity gives rise to the virtue of mercy, a kind of sympathy or compassion, which is understood as the greatest of the virtues that unites a person with a neighbor" (McCarthy 2011, 282).

While Aquinas's main reason for treating war within the section on charity was to point out how unjust wars constituted a sin against the highest virtue it is also indicative of the teleology of his virtue ethics. As a result, his discussion of the just war, as all of his ethics, is finally directed toward the endpoint of unity with God, to life after death. Having said that, however, taking divine charity as the "necessary lodestar" (Gorman 2010b, 61) of human action does not deny the necessity of meting out justice during mankind's time on earth; the telos of earthly just war reasoning has to be an approximation of the eternal kingdom imagined as peace on earth. Working

towards that goal may at times justify the use of lethal force. However, affirming the necessity of force in the temporal realm must not lead to a forgetfulness about the final goal which is to overcome violence. Put differently, Aquinas's thinking on temporal government must be seen as an "interim ethic" (Weigel 1987, 358) in which government takes on the responsibility for establishing and maintaining the natural goods of earthly life, thus providing the basis for human beings so that they can strive for their supernatural perfection.

Taking charity as the "lodestar" has arguably manifested itself in the evolution of the just war. For example, consider the Catholic just war doctrine which is indebted to St Thomas's thinking. The change in Catholic teaching from a "presumption against injustice" towards a "presumption against war," which Johnson (1996) criticises as breaking with the just war tradition, might in fact be considered as an, arguably praiseworthy (Hehir 2000, 33), alteration of Church teaching based on the theological virtue of charity. McCarthy (2011, 298) considers this development of Catholic Social Teaching as a consequence of a "re-appropriation of Thomistic virtue ethics in the past century and at Vatican II." While the core of Aquinas's natural law based just war has arguably never been abandoned modern popes have opted to emphasise prudential and charitable concerns through acting as "minister of peace" (Reichberg 2012, 1080).

The same development can be detected with regard to the parallel between war and capital punishment. As Feser and Bessette (2017) argue, modern popes up until Pope Francis, often publicly perceived as opposed to the death penalty, did not rule out the death penalty in principle. What Francis's predecessors did, the authors argue, is emphasise prudential concerns which seemingly advise against executing this type of punishment. It seems that concerns for prudence, as well as charity, were behind this distancing from the death penalty when, for example, Pope Francis (2015), at the time still following the interpretation of his immediate predecessors, stated that "The death penalty is contrary to the meaning of *humanitas* and to divine mercy, which

must be models for human justice.” Francis (2017), even more directly, spoke of “the primacy of mercy over justice.” This quote perfectly illustrates how the theological virtue of charity, in its form of mercy, shapes the cardinal virtues like justice. As Dulles (2001, 34) succinctly summarises: “In practice, then, a delicate balance between justice and mercy must be maintained. The State’s primary responsibility is for justice, although it may at times temper justice with mercy.” Given their recent remarks, it seems that modern popes have made the view that “punishment by the sword, like wars of conquest, represents a lesser stage of civilization than we aspire to” (Luban 2012, 299) their own.

To illustrate St Thomas’s account of virtue ethics vis-à-vis the use of force, Reichberg (2017) has provided an innovative interpretation of Thomistic right intention. Granted that St Thomas was very sparing in detail, Reichberg contributes an interpretation based on two cardinal virtues. For Aquinas, the criterion of right intention “served as shorthand for the set of underlying moral dispositions that are required for persons engaged in matters of war, whether political leaders and citizens, military commanders, or rank-in-file soldiers” (2017, 113). Importantly, while Reichberg grounds his discussion in the virtues of military prudence for commanders and battlefield courage for rank-and-file soldiers he does not forget to give due attention to the doctrine of the unity of virtues.

### ***Military Prudence***

Military prudence, according to Aquinas, is a virtue of commanders who regulate the decision-making about war (Reichberg 2017, 66). Prudence contributes to the overall goal of achieving justice. For Aquinas, the virtue of prudence had special significance among the intellectual virtues (2017, 68). Quoting St Augustine, Aquinas (ST, II-II, q. 47, a. 1) states that “Prudence is the knowledge of what to seek and what to avoid.” Prudence is meant to be a “choice – the inner act by which the will selects among alternative goods” (2017, 70). Departing from Aristotle and the Romans, St Thomas

did not use the terms of military art or science but that of military prudence (2017, 67). In contrast to art, which only applies to extrinsic acts, prudence applies intrinsically as well. As a practical consequence, while for military conduct understood as art an immorally fighting but winning general is still a capable commander, this would not be the case for a prudently fighting general. For the latter, any intentional misconduct, either through direct intent or negligence, would be considered unjust (2017, 72).

As military acts are carried out for the sake of the common good and the prince and commanders bear responsibility for that good, justice in war must be the prince's main concern (2017, 78). As St Thomas (ST, II-II, q. 66, a. 8) puts it himself: "As regards princes, the public power is entrusted to them that they may be the guardians of justice: hence it is unlawful for them to use violence or coercion, save within the bounds of justice (...)" It goes without saying that, following Aquinas's thinking, purely consequentialist strategies would be deemed illicit (2017, 78). However, as Biggar (2013b, 57) notes, a Thomistic reading of the just war does allow for consequentialist considerations: "Thus, Christian just war thinking is realistic. It requires the prudential consideration of circumstances, even the 'weighing up' of goods and evils, albeit within the terms set by moral norms of conduct. When it is (as it should be) more Aristotelian than conventional-Kantian – and when it is more Thomistic than Augustinian – it recognizes that the prudent pursuit of genuine self-interest is, within the bounds of justice, not only permissible but also obligatory." As St Thomas (ST, II-I, q. 20, a. 5) puts it himself: "*On the contrary*, The consequences do not make an action that was evil, to be good; nor one that was good, to be evil." Ignoring foreseeable consequences, however, makes a person morally culpable to some extent. Following the same train of thought, Johnson (1996, 29) argues that concerning the question whether prudential considerations may trump the presence of a just cause, St Thomas would leave it to the sovereign to decide.

Following Aquinas's doctrine of the unity of virtues, commanders also need to acquire the other complete virtues besides justice; they "are expected to be comprehensively good people" (Reichberg 2017, 79). In sum, the requirement of prudence asks the commander to do several things at the same time: "To maintain a moral posture amid the fear, confusion, and uncertainty of the battlefield, military professionals must learn how to conjoin reasoned judgment, technical skill, and the appropriate emotional dispositions" (2017, 81).

### ***Battlefield Courage***

Regarding courage, St Thomas developed a two-stage theory that distinguished between martyrdom and military heroism in which the former took central stage. Martyrdom represented the paradigm of infused fortitude whereas military heroism stood for acquired fortitude (2017, 82-83). For Aquinas, there were two particular passions that had to be regulated by the virtue of fortitude, namely fear and daring. Due to the fact that Aquinas's account of these aspects is quite brief, this thesis follows Reichberg's (2017, 84) interpretation of the dispositions reinforcing courage, namely "hope, anger, perseverance, and the like."

As Reichberg (2017, 89) points out, St Thomas's take on battlefield courage rests on two pillars. First, he provides, "in thick normative terms, what might count as the appropriate setting for the exercise of this form of courage." Second, relying on moral psychology, he analyses the emotional reactions of soldiers fighting virtuously in war. The first pillar falls under today's category of *jus ad bellum*. In contrast to Aristotle, St Thomas linked the exercise of courage to the criterion of just cause defined as the protection of the common good against external threats. He thus denied the exercise of courage to those fighting in an unjust war (2017, 90). The second pillar, then, addresses questions that would fall under today's *jus in bello*. Here, Aquinas discusses the emotional dispositions that should be upheld in war. In order to do this, Aquinas points to the "auxiliary role" of the virtues of courage and temperance in



particular. The function of these two virtues is “to ensure that virtue, as ordained by right reason, is not abandoned under peril of death” (2017, 91). Having said that, for Aquinas, relying on the doctrine of the unity of the virtues, the other virtues, both theological and cardinal, would also need to be taken care of (2017, 91).

Given that the first pillar, namely a just cause, has been established, St Thomas points to the passions of fear and daring which must be regulated during war via the virtues (2017, 91-92). As Reichberg summarises Aquinas’s argument that these two passions arise at the prospect of future harm (2017, 92): “Fear is the impulse of flight in the face of an evil that seems superior to our power, while daring is the contrary impulse of attack, by which we thrust forward to eradicate the threatening object, confident in our ability to prevail over it.” Relating the virtue of courage to fear, St Thomas points out that courage triggers endurance, leading to the soldier’s acceptance that “we must sometimes ‘stand immovable in the midst of dangers,’ willingly enduring harm even to the point of death” (2017, 92). Relating courage to daring, courage triggers restraint or moderation. Courage thus pulls the breaks on a passion that, at the worst, might lead to atrocities being committed. “Feeling superior to the threat, we go on the attack (*aggredi*), offensively seeking victory over it. While this reaction can be morally appropriate, it may also happen that we act without due reflection, thereby underestimating the danger at hand to the detriment of the goods we wish to defend” (2017, 92-93). Concerning atrocities committed by individual soldiers who carry out crimes without sanction or following ignorance by their superiors, these crimes count as private sins and “do not necessarily flaw an otherwise justified war” (Boyle 2003, 164).

Important to note is that the virtues work in collaboration. Consequently, the acts of endurance and attack are “complementary” (Reichberg 2017, 93). The goal of virtue is to achieve excellence, “so that where attack is called for, courage will stimulate daring; inversely, should a man be inclined to endure harm needlessly,

holding his own life cheap, courage validates fear so that he flees from a harm the endurance of which will bear no fruit” (2017, 93). Having said that, however, endurance and attack are no equals. For St Thomas, endurance takes precedence over going on the attack: “Although daring becomes virtuous when it is tempered by reason and choice, the very propensity of our sentient nature supports this office of moderation, for ‘to lash out against that which promises harm’ is spontaneously curbed by the contrary ‘fear of receiving harm from that source’” (2017, 94). Still, as Reichberg (2017, 95) points out, although endurance is the “primary act” of courage, this does by no means discount daring. As demonstrated above, in contrast to some authors (see, e.g., Miller 2002), Aquinas does not start from a “presumption against war,” but from a “presumption against injustice.”

Moving on to the dispositions supporting the virtues, for this thesis, the passion of anger is particularly relevant which concerns the act of going on the attack. Reichberg (2017, 97) quotes Aquinas that “it belongs to anger to strike at the cause of sorrow (...) so that it directly cooperates with fortitude in attacking.” However, as noted above, the right measure of anger must be found. The correct amount of anger, then, may even lead to withholding the use of force. In Reichberg’s words (2017, 97-98): “Although the function of virtuous anger is to penalize wrongdoing, it never aims purely and simply at harming the evildoer, who, despite his offense, remains a worthy target of charitable concern. Enemies of the polity (*reipublicae hostes*) who are in danger of death should not be deprived of succor.” This aspect also concerns the question of how severe a punishment should be. As Finnis (1998, 214-215) points out, for Aquinas, the severity of punishment should depend on the extent of the offender’s fault, not on the harm that happens to have been done. Consequently, it might at times be more prudent not to impose a punishment even if it is deserved. Likewise, as Gorman (2010a, 254) notes, for Aquinas, “not every sin merits the penalty of death, and the wicked should be allowed to live if killing them would inordinately endanger innocent people.”

## **6.2 Liability to Small-Scale Force and Just Cause**

While there had been a punitive aspect in the deliberation leading up to the Yamamoto mission, this operation was explicitly justified as an act of self-defence. Reflecting on the legitimacy of the mission, one scholar noted that the operation was justified exactly because it was not an act of punishment. Thus, the contemporary limitation of just cause to self-defence which international law as well as both Walzerian just war theory and revisionists uphold re-appears. The just cause of self-defence is inherent to Aquinas's just war, too. That is why the Angelic Doctor did not even mention self-defence in his discussion of just war. There is consequently no disagreement between the Thomistic just war and contemporary just war reasoning with regard to the justice of self-defence.

Despite the broad contemporary consensus on self-defence as only legitimate just cause, however, the Obama administration challenged what self-defence actually means. St Thomas and the just war tradition generally advocate an understanding of self-defence built around the qualifiers of proportionality and immediacy. This understanding allows pre-emptive action against imminent threats, but denies the morality of purely preventive uses of force. In contrast, the Obama administration proposed a re-conceptualisation of the imminence qualifier to self-defence so that imminence is perceived of as permanent in the face of the absence of evidence that a potential assailant has no intention to carry out an attack now or at any point in the future (see, e.g., Erakat 2014; Trenta 2018). As a result of this break with the traditional understanding of self-defence such uses of force turn into preventive action. From a moral perspective which includes the Walzerian, revisionist and Thomistic just war such an interpretation seems clearly wrong and unworthy of a casuistical investigation.

Given the broad consensus on self-defence as subject to the qualifiers of proportionality and immediacy it seems safe to conclude that the rationale of self-

defence applies to targeted killing in the same way. Having said that, however, arguing that self-defence is a just cause for targeted killing does not end the debate about the overall justness of such operations. Rather, as will be investigated later, the criterion of right intention also has to be met.

### **6.2.1 Targeted Killing as Retribution**

Having argued that there are no second thoughts in principle about the justification of self-defence targeted killings if those are based on the criteria of proportionality and immediacy the discussion now turns to an aspect which merits a casuistical analysis. Looking at the contemporary limitation of just cause to self-defence, the Thomistic casuist who follows the retributive reading of Aquinas will detect a possible moral conundrum as he or she considers a just use of force as essentially punitive. As a result, restricting the use of force to self-defence only would potentially allow for the continuation of a state of injustice.

Consequently, from a Thomistic point of view it seems questionable that Yamamoto was only targetable as long as he was contributing to the Japanese war effort. What matters is not only his current role in contributing to an ongoing aggression but also his past culpable wrongdoing. Importantly, however, arguing that Yamamoto was morally culpable for previous wrongdoing and thus deserved punishment in principle does not necessarily mean that his punishment should be executed; prudential and charitable concerns are also part of the calculus whether a deserved punishment should be carried out. As discussed in the authority chapter, a change in the understanding of sovereignty enshrined the self-defence rationale as the primary just cause for war. Several factors contributed to this change one of which was the dreadful experience of the Thirty Years' War. Limiting just cause to self-defence, from a Thomistic perspective, can be considered a prudential judgement aimed at reducing the occurrence of war. Put differently, for natural law theorists not every injustice beyond a sovereign authority's border, although deserving of

punishment in principle, should actually be rectified. While Yamamoto deserved punishment in principle the argument made here is that, due to prudential reasons, it would have been unwise to execute the punishment. The potential result of a policy of retributive targeted killing of state representatives would be a morally catastrophic return to punitive warfare between states, an opening of Pandora's Box. It should be noted at this point that Yamamoto's role as member of the armed forces, from the Thomistic point of view, does not change the moral calculus. Following natural right (*ius naturale*), the legalist paradigm's argument that in war members of the armed force are generally targetable, irrespective of the just cause criterion, seems ethically indefensible. Of course, the demands of human positive law, similar to the scenario of the legal equality of combatants, may affect the judgement of whether certain types of state representatives can be *legally* targeted irrespective of the justice of their side's cause, but such a conclusion stands somewhat removed from what is morally right.

Given that the official justification of the Yamamoto operation was based on self-defence this particular case is a valid paradigm for retributive targeted killing. The reason for this is that there is room for questioning whether the prudential concerns against retributive killing of state representatives also advise against the targeted killing of culpable non-state actors. More specifically, the task for the casuistical analysis is to assess whether the maxim "the use of force short of war is only morally justifiable in self-defence" is ethically defensible with regard to the threat of non-state terrorism. If the intuition that the limitation to self-defence is not just morally questionable in principle but should also be no longer upheld with regard to prudential reasons in the "war on terror" the casuist will then have to decide whether and how to replace the above mentioned maxim.

Starting with the taxonomy of cases, the obvious differences between the Yamamoto case and the cases from the "war on terror" must be emphasised. Admiral Yamamoto was the representative of a political community and thus an agent of a

sovereign authority. This clearly sets him apart from Islamist terrorists who fail the authority test. However, what matters only for the purpose of this casuistical investigation is whether Yamamoto was morally culpable for wrongdoing. Given what is known, it seems reasonable to conclude that he was in fact morally culpable for grave injustice as his key role in the planning of the attack on Pearl Harbor as well as his general involvement in the Japanese war effort testifies. Of course, there still is the question as to the extent of his moral culpability given that he was part of the military chain of command. However, given his senior position, it seems reasonable to conclude that he was morally culpable to an extent that, from a natural law perspective, justifies the death penalty in principle. Arguing that he was liable to defensive targeted killing in his current role, while also true from a natural law perspective, constitutes a further just cause. Only allowing for self-defence, however, is to deny an ethically defensible just cause. The reason for this is that all natural law based moral principles follow from the very first precept which St Thomas identifies as “good is to be done and pursued and evil is to be avoided” (ST, I-II, q. 94, a. 2). As a consequence of this most general demand, the classical Christian just war determined that its “paradigm was the defence of the innocent against injustice” (Biggar 2013a, 159). The logical result of this interpretation is that the killing of enemy combatants is justified paradigmatically by their being culpable of objective injustice (2013a, 212). Having said that, arguing that there is just cause in principle for retribution does not amount to the argument that such uses of force should be carried out. These are matters of prudential judgement which is not the concern of the just cause criterion. The criterion that carries this weight is the principle of right intention.

Going through the post-9/11 cases, the one that emerges as the least questionable with regard to retribution are both bin Laden accounts. Although Secretary of Defence Gates used the term vengeance which connotes excessive violence (Biggar 2013a, 65), one might still look at the case through the prism of retribution. Bin Laden had been culpable for several terrorist attacks against the

United States which cost thousands of innocent lives. For this wrongdoing he deserved punishment. Through his hiding, he actively opposed the re-establishment of justice his punishment would bring. Had he not been opposed to justice, he could have turned himself in and stood trial. Furthermore, although there was a high likelihood that the bin Laden operation would cause serious diplomatic irritation between the US and Pakistan the threat of war between the two countries seemed remote.

Rivalling the bin Laden cases in clarity is the case of Anwar al-Awlaki. There seems to be sufficient evidence against him to argue that, in both his inspirational and operational roles, he had made himself deserving of punishment. The main difference between the bin Laden and al-Awlaki case is one of magnitude. It seems that bin Laden's culpability was greater than that of al-Awlaki if measured by the deaths of innocent people the two terrorists brought about or inspired. Moreover, as with Pakistan, the danger that Yemen would go to war with the US over al-Awlaki did not exist at any time.

Slightly less clear is the case of Saleh Ali Saleh Nabhan whose moral culpability for past wrongdoing equals that of bin Laden in neither clarity nor magnitude. As the account of Nabhan's case demonstrates, he was considered to be connected to several terrorist attacks although it seems that questions about his actual involvement remain. In addition, the central government of Somalia was arguably the weakest one in all cases considered and there was thus no danger of a confrontation between Somalia and the US in the aftermath of this particular operation.

The al-Kazemi case is even less clear. Important to stress here is that al-Kazemi had already served a prison sentence for his wrongdoing. As he had served his punishment, the balance of justice had arguably been restored and killing him for the misdeeds for which he had been imprisoned was arguably unjustified. Having said

that, even in this instance there was no major diplomatic irritation between Yemen and the US as the leaked diplomatic cable testifies.

Next on the spectrum is the strike at Datta Khel. Not only did the US apparently not know who they were striking at, there are indications that the assault was a mere demonstration of power by the CIA in response to the Davis affair. It seems that the strike at Datta Khel, following this reading, was no act of just retribution but an act of illicit vengeance. What makes Datta Khel worse in moral terms is that, in contrast to the unofficial bin Laden account, the act of vengeance was directed at people who bore no guilt of prior wrongdoing. Quite the contrary, it seems they were randomly chosen for vengeful execution. In this light, it is unsurprising that this illicit strike caused a serious deterioration of US-Pakistani relations. However, again, this deterioration was entirely justified due to the unjustness of the operation and does therefore not contradict the argument that retributive targeted killing can be justified. Furthermore, even despite this diplomatic irritation, there was no danger of war between the two countries.

Vengeful execution, likewise, might have been the rationale behind the last strike on the spectrum, in case Abdulrahman al-Awlaki was no mere “collateral damage,” but specifically targeted. This interpretation flows from the interpretation that he was killed solely for being the son of his father. Considering the circumstances of the case there is nothing the son of Anwar al-Awlaki was culpable of. The only possible justification one might derive is that he had joined AQAP in order to seek revenge for the targeted killing of his father. However, even if one accepts this theory, he had not yet committed any wrong besides potentially considering future unjust action.

### **6.2.2 Discussion and Verdict**

There are a few noteworthy exceptions to the general rejection of punitive force besides the obvious case of Johnson, but most of them either fail to go beyond a



general embrace of the concept (see, e.g., David 2003; Elshtain 2003; Statman 2004) or propose their own version which seems hard to reconcile with Thomistic just war thinking (see, e.g., Biggar 2013a; O'Donovan 2003).

To begin with, Elshtain (2003, 108), advocating an Augustinian account of just war, supported a retributive take that, unfortunately, remains unspecific: "Usually, when a true tragedy occurs – a flood roars through a canyon, for instance, and kills vacationers – there is no one to punish. When acts of terror destroy lives, however, there are specific persons we do, rightly, punish. It is this task of punishment, essential to any workable vision of political justice, that many contemporary Christians shun." David (2003, 122), discussing Israel's policy of targeted killing, approves of the use of lethal force as retribution if the action employed serves no utilitarian purposes and is not motivated by vengeance. David's account, although vague as well, supports St Thomas's general idea that wrongdoing deserves to be punished. Statman (2004, 188-189) embraces David's take while adding a defence of retributive killing against the objection that punishment can only be imposed by legal institutions, not by governments.

O'Donovan provides an account that, in line with St Thomas, portrays war as the extension of government responsibility to the international sphere. As pointed out above, Aquinas saw the task of government to work towards a *tranquillitas ordinis*, internally as well as externally. O'Donovan (2003, 6) builds on this conceptualisation and characterises a government's decision to wage war as "an extraordinary extension of ordinary acts of judgment." Having said that, however, O'Donovan (2003, 53) goes on to claim that for an act of war to be just, all of St Thomas's just causes have to be met simultaneously: "So understood, it is plain that while these forms of judgment can be distinguished, they cannot be separated. Any concrete act of armed force will depend in some measure upon each of the three, and will combine defensive, reparative and punitive objectives, though with different weightings, depending on

what the truth of the particular judgment requires.” This amounts to an innovative interpretation of just cause which seems hard to reconcile with its classical understanding.

Likewise, Biggar (2013a, 65) includes retribution in his account of the just war, stressing that retribution properly understood cannot include vengeance as it would make any punishment disproportionate. Biggar proposes a model of war between the two poles of compassion and absolution, with retribution situated somewhere in between. Apart from being overly broad as Reichberg (2017, 144) notes, Biggar’s account seems difficult to reconcile with St Thomas’s thinking because of his take on moral culpability. While Biggar, in contrast to McMahan, does allow for retribution, he (2013a, 190) adopts the latter’s liability account, explicitly rejecting Aquinas’s notion of desert: “We have argued that the victim’s moral guilt is not necessary for killing to be duly respectful and therefore justified; and that his objective wrongdoing – together with right motive and intention, last resort and proportion – is sufficient.”

Most contemporary critics generally rule out punitive just causes and, in particular, take aim at the objective of retribution. Boyle (2003, 163), for one, claims that today’s legalist paradigm with its concentration on self-defence constitutes a laudable development of just war thinking. As Luban (2012, 304) demonstrates, however, three of the four standard justifications for criminal punishment, deterrence, incapacitation, and prevention, have been incorporated in today’s accepted legalist paradigm. The only justification that has been abandoned is that of retribution. It thus seems that although retribution has mostly been ruled out, the other aspects of punishment have only been re-labelled as acts of defence. Having said that, as this section explicitly looks at retribution, an overview of the arguments of the concept’s critics must be provided.

Luban (2012) provides arguably the most comprehensive critique of punishment as just cause for war which any concept of retributive targeted killing

needs to address. He (2012, 305), distinguishes between “proportional retribution,” defined as the “meting out ‘the measure that they meted out to us’” and “sheer revenge,” defined as the “meting out ‘more than the measure that they meted out to us.’” What both approaches have in common is that, in contrast to self-defence, they aim at responding to past misdeeds. Luban concludes that war as punishment cannot be justified because of five particular reasons: “(1) It places punishment in the hands of a biased judge, namely the aggrieved party, which (2) makes it more likely to be vengeance than retributive justice. (3) Vengeance does not follow the fundamental condition of just retribution, namely proportionality between punishment and offense. (4) Furthermore, punishment through warmaking punishes the wrong people and (5) it employs the wrong methods.”

McMahan (2008, 83-84), in essence, embraces Luban’s critique, calling retributive war “the worst sort of vigilante action” (2008, 83). Specifically addressing targeted killing, McMahan (2012a, 135) rules out a justification based on either vengeance or retribution, sticking to his account of liability to defensive killing. Interestingly, he (2012a, 135-136) does not base his rejection on moral, but consequentialist grounds: “But even if some wrongdoers deserve to be killed, the importance of giving them what they deserve is, on its own, insufficient to justify the risks that a policy of targeted killing imposes on innocent people – most notably, the risk of misidentifying the intended victim and the risk of harming or killing innocent bystanders as a side effect.” In addition, McMahan (2012a, 136) argues that if retribution was the goal, capture, not killing, would have to determine policy as retributive justice requires a trial that determines punishment according to desert. Due to the conciseness of his argument, this thesis will focus on Luban’s account, taking for granted that rebutting Luban, at the same time, means criticising McMahan.

Starting with Luban's sovereignty objection, retributive targeted killings should be based on St Augustine's parental model. Underlying Luban's objection, in a nutshell, is the idea that in an era of sovereign states and a largely dysfunctional UN system, no one state can act as unbiased judge. This thesis acknowledges this dilemma for relations among states but argues that retribution can play a role in the relation between states and non-state actors because the legitimacy inherent to the state as the defender of the common good privileges the latter over non-state actors when it comes to the use of force. It is noteworthy that even Luban (2012, 316) acknowledges the potential viability of retribution in asymmetric conflict:

Evidently, the punishment theory of just cause declined with the consolidation of the nation-state system, because it seems inconsistent with the theory of sovereign equality. One corollary of this point of view is that the sovereignty objection to the punishment theory of just cause does not apply when the adversary is a nonstate actor. Thus, the sovereignty objection leaves open the possibility of resurrecting the punishment theory in the War on Terror or other asymmetrical wars against militants and nonstate organizations, at least if the states of these militants and nonstate organizations consent to outsiders using force on their territory, as Pakistan and Yemen have reportedly consented to U.S. drone strikes.

In addition, Luban's last point that retributive action against non-state actors on foreign soil requires the consent of the respective state also is not necessarily accurate. The bin Laden case seems to be the prototypical example of a state that is either unable or unwilling to establish justice. Depending on one's reading there are two possible interpretations of Pakistan's behaviour with regard to bin Laden. Either Islamabad did not know that bin Laden was hiding in Abbottabad or it was unwilling to prosecute him, potentially even using him as an asset against the US. Having said that, despite serious diplomatic irritation in the aftermath of bin Laden's demise, if one follows the official account, there was never a danger that the operation would trigger a broader conflict between the United States and Pakistan. After all, bin Laden was no leading Pakistani general similar to the position Admiral Yamamoto held. Rather than being a representative of a political community who was attacked by a

foreign power on its own soil, bin Laden was something close to the personification of Islamist terror.

Of course, one issue that immediately arises is the argument that Pakistan was by far the lesser military power compared to the US. Some might argue that, had Pakistan been the US's equal, the threat of war would have loomed larger in the aftermath of the night time raid. In other words, such action is likely to only take place in third world countries which are unable or unwilling to take the risk of confronting the great power which carried out military action within its own territory. And in fact, looking at the cases all operations took place within such countries. In response, such concerns are certainly not without merit. None of the countries in which the Obama administration carried targeted killings could have risked going to war with the US. In addition, new technological means like the use of drones adds a further problem which Brunstetter and Braun (2013, 92) describe as follows: "Technology that permits *jus ad vim* actions, if not governed appropriately, empowers strong states to use force in ways to further their own security and interests, while placing weak states at their sufferance." However, this argument does not affect the judgement that culpable terrorists who hide in these countries deserve punishment and are either supported by these countries or they fail to meet their obligation to bring the terrorists to justice. As the danger of war between the intervening party and the host country seems remote it seems reasonable to conclude that allowing for retributive targeted killing in such cases is licit and does not amount to an opening of Pandora's Box which leads the natural law casuist to rule out retributive targeted killing against state representatives on prudential grounds.

Importantly, while the question of war seems to be the most important one, there are further prudential considerations decision-makers will have to grapple with before undertaking a retributive targeted killing. A non-comprehensive list of such further prudential tests would include the weakening of alliances and, for example in the case of Pakistan, tribal loyalties. Moreover, public fear and the possibility of a

backlash against the intervening state must be calculated. The Thomistic argument for targeted killing thus already includes the idea for which Brunstetter and Braun suggest a distinct new principle of “probability of escalation.” Having said that, of course, the preferable option would be that states who fall under the unable or unwilling category take care of their responsibilities and prosecute hiding terrorists themselves. Only in cases where it is reasonable to judge that a state of non-state responsibility exists would retributive targeted killing be justified. St Thomas can be read as supporting this position. In the *Summa*, Aquinas distinguishes between “general war” (*bellum publicum*) and “particular war” (*bellum particular*). As Reichberg (2013, 188) explains, the former St Thomas

(...) contrasted to a ‘particular war’ (*bellum particular*), which designated force that was used by or directed against private individuals. It could be just or unjust, depending on the case. Individuals engaged in gang violence (*rixa*), or criminals resisting arrest would be waging an unjustifiable ‘private’ war; inversely, ‘a judge who does not refrain from giving a just judgment despite fear of an impending sword’ is cited in the same passage (q. 123, a. 5) as an instance of an individual undergoing a just private war. The same could be said of any private individual who made proportionate use of force in defending himself from the attack of thieves or other malefactors. *Bellum generale*, by contrast, designated the condition whereby one ‘multitude’ (that is to say, the fighting force of an independent polity) contends against another such multitude on the battlefield, and in the process each considers the other its external enemy. For Aquinas, this was *bellum* in the most proper sense of the term.

The question that arises from this distinction is how Aquinas would have classified the retributive targeted killing of a culpable unjust individual on foreign soil by a sovereign authority. At first look, given Aquinas’s definition, it seems that such violence would constitute an act of *bellum particular*. After all, the use of force carried out in response to the unable or unwilling judgement is explicitly executed against an individual and not the state in which she hides. However, for the author of this thesis, Aquinas can be read as considering such violence as *bellum generale* nonetheless. The reason for this is that the use of force is undertaken by a sovereign authority for the benefit of the common good, namely to re-establish a state of justice which the culpable unjust individual had disrupted through her unjust deeds. Interestingly,

Reichberg, although warning against an anachronistic reading of Aquinas because he did not employ the distinction between the two types of war “in a precise technical manner,” agrees. He (personal communication, December 4, 2017) told the author that

If Aquinas were to entertain the situation that you have in mind, I think he would agree that force justly used by public authority against individuals of another polity could count as an instantiation of *bellum generale*. He actually comes close to using this example in his discussion of just cause in q. 40, a. 1, where he cites Augustine as saying that a just war is one that avenges wrongs that have been perpetuated by individuals, i.e., subjects of a neighboring polity. In this example, the war is directed by one polity against another, because the latter has neglected to make amends for wrongs done by its individual subjects, who have presumably acted on their private initiative, against the other polity. The US military initiative against Afghanistan in 2001 (retaliation for the Taliban’s failure to hand over Bin Laden and other Al Qaeda leaders who had acted with impunity on Afghanistan’s territory) fits the sort of case seemingly envisioned by Augustine.

This argument similarly applies to the cases where the targeted person arguably deserved punishment from a natural law perspective, namely Anwar al-Awlaki and Saleh Ali Saleh Nabhan. Again, arguing that these persons deserved punishment does not say whether it should be carried out. These are additional prudential judgements which are assessed by the right intention criterion.

It needs to be said that Luban makes a distinction between what he calls the “sovereignty objection” and the “biased judgment objection.” While he can, as the above quotation demonstrates, imagine retributive action against asymmetric threats despite the general sovereignty objection, he stresses that the biased judgement objection must also be upheld in state-non-state-conflict (2012, 318). In Luban’s eyes, the punisher cannot escape the slippery slope that is the temptation of showing vengeance in response to wrongdoing; punishment as retribution will always fail the proportionality test. While acknowledging that it is difficult to find the right proportion between crime and punishment, and vengeance can indeed be tempting, this thesis argues that it is nonetheless achievable. Following St Thomas’s account of

virtue ethics, it is possible to act as unbiased judge if the person ordering or executing the punishment acts virtuously.

Furthermore, the biased judgement concern can be eased through a concrete government action that should constitute a core principle of targeted killing. As pointed out above, war as retributive punishment invokes the concept of capital punishment. In contrast to (ideal) domestic legal punishment which is preceded by a fair trial during which the accused can defend themselves, however, most asymmetric threats actively try to evade trial and punishment. Terrorists in hiding seek to escape from justice and thus shun the opportunity provided by sovereign authorities to defend themselves. Put differently, only because of the terrorists' hiding are sovereign authorities forced to resort to the, borrowing O'Donovan's (2003, 6) phrase, "extraordinary extension of ordinary acts of judgment," which the policy of targeted killing constitutes.

It goes without saying that for justice's sake a fair trial before the execution of any punishment is the preferable option. In other words, the best case for targeted killing would be that it is not needed, that the accused would turn themselves in and stand trial. Alas, as the cases demonstrate, voluntary surrender of Islamist terrorists is unlikely and thus the sovereign authority will not be able to fully address the biased judgement concern. What it can and should do, however, is conduct a trial in absentia. Such a procedure would constitute the closest available approximation of a fair trial. Fortunately, the great advantage of targeted killing as retribution is that in such cases the respective person is prosecuted for something she did in the past. That is what distinguishes this form of targeted killing from its self-defence variation which often takes place in times of great urgency. Of course, in reality there will often be overlap between the just causes of self-defence and retribution. Having said that, however, this overlap must not lead to justifying an action in terms of self-defence while what really drove the decision was a concern for retribution.



It might then be that the trial in absentia concludes that the culpability of the accused is so grave that only the death penalty would be proportionate as a matter of justice. Naturally, sentencing a person to death will be rejected by opponents of the death penalty which seems, from today's perspective, like an outdated form of punishment. Nevertheless, one should not forget two important aspects. First, the death penalty following a trial is much more discriminate than the current laws of war. One should recall that the Obama administration justified its policy of targeted killing not just in terms of self-defence but also in terms of the United States being engaged in armed conflict with Al Qaeda and associated forces. As a result, Al Qaeda members were considered to be targetable in terms of group membership alone. In contrast to, for example, the case of Datta Khel where the United States attacked a group of people based on patterns of behaviour, targeted killing as retribution requires a trial which proves the guilt of the suspect(s). More importantly still, as the next section on right intention demonstrates, concluding that a person deserves the death penalty in principle does not necessarily mean that this sentence should be executed.

Finally, Luban (2012, 325-326) argues that even if the biased judgement objection could be resolved, retributive war would still not be justifiable as war, by its nature, cannot be discriminately waged. "War is a blunt instrument. Despite easy talk about 'surgical' strikes and 'precision' attacks, the fact is that warmaking wreaks damage across entire towns, cities, and territories. Wars are the equivalent of natural disasters such as floods and hurricanes, and even the most discriminate war breaks whatever it touches. Thus, if war is retributive punishment, we must acknowledge that it is *collective* punishment, indeed collective corporal punishment." After briefly considering and rejecting the potential objection that lethal force could be employed against culpable individuals only, perhaps allowing for some foreseeable but unintended collateral damage, Luban quickly returns to his argument that wars between nation-states can never be discriminate even stating that "Operations such

as the killing of Osama bin Laden by the United States are the rare exception” (2012, 326).

Accepting Luban’s point that conventional wars between states, more often than not, employ disproportionate and indiscriminate force, this thesis, however, explicitly considers what he calls the “rare exception.” Targeted killing can, if carried out justly, be both proportionate and discriminating. A proper retributive targeted killing does not resemble an act of collective capital punishment, but the use of individual capital punishment in response to a heinous past act of wrongdoing. Moreover, the means most often used in targeted killings like, for example, drone strikes or commando raids, can be used much more discriminately than most of the capabilities associated with traditional state-against-state conflict.

### **6.3 Liability to Small-Scale Force and Right Intention**

Having established that targeted killings can have defensive and retributive rationales the thesis has not yet considered the criterion of right intention which gives concrete shape to just cause. The nature of targeted killing conceived as either commando raids involving ground troops or strikes from the air raises difficult questions for right intention. For St Thomas, right intention was supposed to make sure that virtue is not discarded under the peril of death. However, air strikes, through unmanned aerial vehicles in particular, essentially reduce the risk of death for the attacking party to zero. It thus seems that Aquinas’s division of labour for virtuous behaviour in war between the command level and the rank-and-file level can no longer be upheld in the era of drone warfare. The remoteness of drone and cruise missile strikes simply do not compare to the courage soldiers must exhibit on the actual battlefield. As a result, only for commando raids that actually involve ground troops and for air attacks that

expose pilots to a certain amount of risk does it make sense to uphold Aquinas's distinction.

### **6.3.1 Targeted Killing as Defence**

Starting with the Yamamoto paradigm, there had been some considerable deliberation at the command level before green-lighting the operation. Possible advantages and disadvantages of killing the admiral were weighed in a process that seems to deserve the characteristic of prudence. In particular, what foremost seems to have contributed to the decision to kill Yamamoto on self-defence grounds was his status as a seemingly irreplaceable military leader. This conclusion was assessed in the light of possible negative consequences of the mission such as, for example, that the Japanese would discover that the US could listen in on its secret communication. Executing the strike was a judgement call in line with the responsibility of the sovereign authority for the common good which the Roosevelt administration answered in the affirmative. It should also be mentioned that the Yamamoto operation was meticulously planned involving multiple government agencies, a prudent decision reminding of the "convergence issue."

Likewise, it seems that the Yamamoto mission passes St Thomas's virtue test on the operational level. It took significant courage for the pilots to undertake the mission. In Aquinas's terms, their courage triggered endurance which helped them overcome the passion of fear. There was plenty of uncertainty extending from whether there would be enough fuel to whether Yamamoto would actually be present in the targeted aircraft, leading to questions about the mission's likelihood of success. Moreover, a mission like this had never been attempted before. In other words, the pilots did not know whether they would come back and, in fact, one aircraft would be lost in the fight. Last but not least, it might be argued that the virtue of courage also helped to regulate the passion of daring as it seems that the pilots closely followed their orders.

Moving on to the cases from the “war on terror,” the official bin Laden account provides most details for a discussion of the virtues. Starting with military prudence with regard to the command level it seems that the Obama administration did not only meet the criterion but went beyond what was necessary. In the months before the raid, a considerable effort was made to critically consider all available options. Obama asked for stronger efforts in order to obtain intelligence as well as for further strike options, apparently resisting pressure from the CIA to act quickly. The underlying rationale in the deliberations seems to have been the common good; defensive force was used to stop a threat to the nation. There are no hints that considerations of political gain played a significant role in the decision. Bin Laden had demonstrated in the past that he was capable of directing terrorist plots that could kill thousands of innocent people. Based on intelligence that he was still actively plotting it would even have been justified to accept some collateral damage. In other words, while the massive bombing option against the compound would have been excessive and Obama prudently rejected this option, a drone strike that did not intend but foresaw the killing of a limited number of innocent bystanders, would have been legitimate. Thus, Obama’s decision to send in SEAL Team 6, with the risk that just combatants could be harmed by unjust threats, went beyond what was morally required. Having said that, ordering the commando raid was, in retrospect, the prudent thing to do. Having proof that bin Laden was actually killed was, at least at the time, considered to be a significant step in bringing the conflict with Al Qaeda to an end. Finally, it should be noted that the president asked all of his principals to put forward their final calculus, prudently taking their advice seriously.

At the same time, however, the command level, in order to act virtuously, should have made clear that if bin Laden was not resisting, if possible without too great a risk for the SEALs, he should not have been denied succour. While it would have been legitimate to kill him if there was any hint that he would resist, it would have been unethical, as some sources suggest was the case, that the mission was

planned as a kill operation no matter what. In addition, the administration, either through Obama himself or his subordinates, should have made clear that mutilating bin Laden's body was unacceptable. SEAL Team 6 had a known history of such practices (see, e.g., Cole 2017) and by not explicitly prohibiting such behaviour, the administration failed to lead by example which, in addition, illustrates the importance of providing proper training to soldiers. Having said that, however, following St Thomas, the mutilation of bin Laden's body does not deny the overall justice of the mission. The crimes committed by the individual soldier, if not ordered from above, remain first and foremost her individual misdeeds.

Regarding rank-and-file soldiers, it seems that SEAL Team 6 showed considerable courage in response to the passion of fear. The commandos had to assume that they would encounter armed resistance by bin Laden and his company, potentially losing their lives. Given that they willingly stormed the compound, in Aquinas's terms, the virtue of courage triggered some considerable endurance which let the SEALs carry out their mission as planned. However, with regard to the passion of daring, the picture is more mixed. In addressing daring, courage should have caused the SEALs to show restraint or moderation in their conduct. Arguably, they showed restraint during their storming of the compound. The shedding of innocent life, according to the official narrative, was minimal and one SEAL even risked his life when he did not kill bin Laden's wife although there was a suspicion she might wear a suicide vest.

However, the killing of bin Laden is more complicated. It would have been morally acceptable to take no risk and shoot him at first sight had there been an indication that he was armed. After all, as argued above, it would have been justified to hit the compound with a drone strike in the first place, probably killing all of its inhabitants. That is why the ethics of small-scale force is unlike policing. There is no demand of a minimal use of force. President Obama, however, prudently made the

decision to take the additional risk of the raid which led to the final confrontation in bin Laden's bedroom. As the official account suggests, bin Laden had been unarmed and did not show signs of resistance. In this light, had there been a way of neutralising him in a non-lethal way, not to deprive him of succour would have been the right thing to do. If reasonably possible, he should have been captured and taken to the US to stand trial. Having said all that, in the end, if there was no clear sign that bin Laden did not pose a threat, it was licit to kill him. After all, he was liable to self-defence targeted killing and the risk the justly fighting SEAL should have taken was minimal. However, no matter whether he was resisting or not, mutilating his body is a clear sign of unvirtuous behaviour.

The case of Anwar al-Awlaki compares to the bin Laden case in several aspects. Al-Awlaki was an ongoing threat who was both an inspirational and operational leader of AQAP. Arguably, during the days when he only had an inspirational role he was not liable to targeted killing, but this changed when he started to actively plot terrorist attacks. As far as the virtue of military prudence is concerned it seems reasonable to conclude that the virtue was exhibited by the Obama administration. There had been a sophisticated intelligence effort leading up to the drone strike and, due to the remoteness of al-Awlaki's hiding place, there was no reasonable chance of capturing him. Consequently, Obama did not face a weighing of different options such as, for example, the use of ground troops. It must also be noted that there was high time pressure as al-Awlaki could have again vanished from the eyes of intelligence services any time.

Similar and yet slightly different to that of Anwar al-Awlaki is the case of Saleh Ali Saleh Nabhan. Based on the rationale of self-defence Nabhan was considered to be an ongoing threat as he was involved in running terrorist training camps and functioned as a liaison between Al Qaeda and al Shabab. As was the case with all justifiable acts of self-defence targeted killing time pressure was high. Likewise, there

was a deliberation process leading up to the strike which considered alternative means. As far as the virtues are concerned, Obama had to weigh potential intelligence gains in case Nabhan could be captured against the risk to his soldiers of getting harmed. Why the president decided the way he did is unknown. However, it can be useful to speculate about his rationale based on what has been reported. In case the president put the latter aspect first it seems to have been a prudent decision to kill Nabhan by missile strike as such a strike would not expose any just combatants to mortal danger. If, however, it would have been possible to capture Nabhan with only reasonable risk to US servicemen, opting for the missile strike only because there was no detention policy in place seems to have been imprudent. This would mean that possible military gains in a war waged for the common good were sacrificed on the altar of domestic political gains.

The case of al-Majalah raises several points with regard to right intention. To begin with, the US, apparently, had obtained intelligence about an imminent threat to its embassy which required a quick response. Acknowledging that less urgency might have brought arguments of caution to the fore, any verdict about the exercise of prudence must factor in this time constraint. In other words, the judgement about the exercise of prudence as the “right reason about things to be done” will have to be a modest one. The case of al-Majalah seems to be one of those where, following St Thomas, one must leave it to the sovereign authority to decide whether prudential considerations may trump the consideration of just cause. Having said that, there were several aspects that called for caution. First, the US knew it was overly dependent on Yemeni authorities with regard to intelligence. With few of their own resources on the ground, the Obama administration had to rely on Yemeni sources and its own signals intelligence. The danger of “getting played” by Yemeni authorities or the misidentification of targets was thus always a possibility which had to be reckoned with. In addition, the options available to the administration were limited; there was neither a raid nor a drone strike option.

Furthermore, it is unknown whether the Obama administration foresaw the death of civilians in the strike but, given the nature of the assumed threat, it does not seem unreasonable to consider some collateral damage to have been justified. In addition, the administration had to calculate a public backlash in case innocent people died, especially if it turned out that the intelligence on which it based its strike decision was false. However, the use of highly indiscriminate cluster ammunition, given the uncertainties, seems to indicate that the Obama administration acted, at least partly, in an imprudent manner. Instead of firing missiles armed with cluster ammunition, a more discriminate payload should have been employed. In other words, the virtue of prudence should have triggered some restraint in the choice of weaponry, not turning the village of al-Majalah into a minefield of sorts.

### **6.3.2 Targeted Killing as Retribution**

The Yamamoto case is not applicable to the following discussion as targeted killing as retribution, due to prudential considerations, should only be employed in confrontations between sovereign authorities and culpable unjust non-state actors. Starting with the official bin Laden account and how it relates to the virtue of military prudence, it seems that the Obama administration, in killing bin Laden, aimed at peace through re-establishing the *tranquillitas ordinis* which had been disrupted by Al Qaeda's activities generally and those of its leader in particular. Relatedly, the idea of achieving "closure," to bring relief to the American psyche after almost a decade of conflict, seems to have been a powerful argument during the deliberations.

Having said that, however, in contrast to the defensive account of targeted killing there are two particular aspects which seem morally problematic and which seem to contradict the virtues of military prudence and battlefield courage as well as the theological virtue of charity. Firstly, while bin Laden deserved the death penalty for his grave wrongdoing from a natural law perspective, he deserved it in principle only. The question whether the punishment he deserved should be executed needs to



be subject to prudential and charitable concerns. In contrast to the self-defence account, there is no consideration of military necessity involved in retributive targeted killing. There is thus room to question whether it would be virtuous to kill a person who is not posing a threat. Such considerations come even before thinking about succour in a scenario like the one of bin Laden standing in front of the SEALs unarmed and non-resisting. Of course, decisions about succour are hard to make as these take place in the heat of battle. In addition, due to the fact that bin Laden was an unjust combatant the SEALs, as just combatants, were right in case they did not accept any greater risk of being deceived by an only seemingly surrendering bin Laden.

Secondly, while targeted killing as self-defence allows for some collateral damage in order to stop an aggression there seems to be no such necessity in case of retribution. Following from the culpability account, bin Laden alone was targetable as an act of retribution. This would mean that striking bin Laden's compound would seem morally wrong as an act of retribution as nonculpable individuals like his family could be harmed. The same issue arises with the Nabhan and Anwar al-Awlaki cases. Even if one accepts the argument that these individuals deserved death in principle for their past wrongdoing this does not mean that they should be killed. In addition, there are serious moral questions concerning the individuals who were with Nabhan and al-Awlaki when they were attacked. It seems that for targeted killing as retribution only Nabhan and al-Awlaki themselves were licit targets. Furthermore, from a retributive perspective it seems to have been wrong to target al-Kazemi at al-Majalah. The reason for this is that he had already served time in prison for his past wrongdoing and, on top of that, had sworn off his life as a terrorist. In consequence, the equilibrium of justice his past wrongdoing had disrupted was already restored at the time the US struck.

Last but not least, before attempting a verdict, one must distinguish the seemingly licit use of targeted killing as retribution from illicit vengeance. In order to do that, consider the unofficial bin Laden account. As pointed out above, the US had just cause to punish bin Laden for his past wrongdoing. Considering the virtue of prudence, it seems that the Obama administration did, initially, exhibit this virtue in the run up to its arrangement with Pakistani authorities. Surveilling the compound, trying to obtain as much intelligence as possible was the prudent thing to do. Mistrust with regard to Islamabad was warranted. Not only had Pakistan, an official US ally, apparently been hiding America's foremost public enemy for years, the nation had also had a proven track record of playing double games regarding the Taliban in Afghanistan. One problem which cannot be resolved here is whether bin Laden was a "voluntary prisoner" of the ISI in the sense that he did not try to escape or whether he was actually being held against his will. Had the latter been the case the Obama administration would have faced a scenario not unlike the one which led to the war in Afghanistan when the Taliban regime was unwilling to extradite senior Al Qaeda members. Had the Obama administration, before it made the deal with Pakistan, decided to send in the SEALs without informing Islamabad, the discussion of right intention would essentially be the same as the one for the official account. The only exception would be that domestic political gain, according to Hersh, played a role in ordering the raid. However, the Obama administration, based on the Hersh account, decided, on insistence by Pakistan, to carry out the premeditated killing of an individual who was not only not resisting but also gravely ill. In addition, the SEALs did not find out about bin Laden's state during the heat of storming the compound. Rather, they had held meetings with Pakistani officials telling them exactly what to expect.

Thus, while bin Laden deserved the death penalty in principle from a natural law perspective, prudential and charitable considerations were disregarded; the targeted killing of bin Laden became an act of vengeance, not an act of retribution.

Further supporting this conclusion is the allegation that the Obama administration had made a plan to announce a cover story which would essentially sell its act of vengeance as a legitimate act of self-defence. It goes without saying that the presence of vengeance unescapably violates the criterion of right intention and is thus irreconcilable with the just use of small-scale force. Furthermore, there is no need to discuss the virtue of battlefield courage here as the SEALs did not encounter a combat situation in Abbottabad. They simply acted as hitmen who, on top of that, mutilated the body of the person they had been ordered to assassinate. Finally, the killing of Abdulrahman al-Awlaki constitutes a prototypical example of an illicit act of vengeance if the allegation is correct that he was only killed for being the son of his father.

### **6.3.3 Verdict**

The above discussion concentrated on the two virtues St Thomas singled out for military conduct, namely military prudence and battlefield courage. As Reichberg points out, Aquinas considered these two especially relevant during war although, in line with the doctrine of the unity of virtues, they do not constitute the complete picture. In particular, divine charity and its derivative of mercy must also contribute to understanding the just use of force.

Making this rather abstract argument, which practical conclusions can be drawn for targeted killing and the criterion of right intention? Starting with targeted killing as self-defence the virtue of charity does not seem to be applicable toward the targets of such action. As the cases have demonstrated, self-defence targeted killings most of the time take place under great urgency. Withholding a justified act of self-defence targeted killing would essentially amount to disregarding the demand of love of neighbour out of which such uses of force are conducted in the first place. In other words, the virtue of charity with regard to self-defence targeted killing is carried out by protecting the innocent from an attack that is ongoing or about to happen in the

immediate future. It is an act of pre-emption that is only carried out as a matter of last resort. It goes without saying that purely preventive uses of force such as arguably the Datta Khel strike are illicit. Related to Datta Khel, signature strikes, due to the unestablished culpability of those targeted, are inherently immoral. In cases when self-defence targeted killing is justified, in order to pre-empt the act of injustice from happening, it might be justifiable to allow some collateral damage. In such cases, the intention of targeted killing is not to target persons whose culpability has not been established, but to prevent a grave injustice from happening. That is why, arguably, some collateral damage was justified in the Yamamoto case as well as in the official bin Laden case. Likewise, in the Nabhan and al-Awlaki cases it was arguably justifiable to kill individuals in the respective terrorist's surroundings without having established either their culpability or even their identity.

Regarding targeted killing as retribution, arguing that retribution can be a legitimate just cause for targeted killing, that culpable unjust individuals, depending on their guilt, may deserve the death penalty in principle does not mean that this type of punishment should be executed. Whenever it is possible to capture culpable unjust individuals this should be a matter of first resort. If captured, these individuals who have been sentenced to death by trial in absentia, will be subject to life imprisonment instead of capital punishment. The reason for this is the foremost virtue of charity. This thesis adopts the argument of modern popes that the death penalty, while justified in principle, fails the test of mercy. Arguably, humankind has changed its attitude toward capital punishment, a praiseworthy development flowing from divine love.

Therefore, in cases without the greatest necessity, lethal force must have strict limits. Having said that, the risk soldiers must take in capturing culpable unjust individuals should be minimal. If there is credible reason to believe that soldiers, as just combatants, may be harmed there is no moral obligation for them to take this

risk. In other words, had it been possible to take out bin Laden with a drone strike such a strike would have been justified on moral grounds. Crucially, however, flowing from the moral culpability account, bin Laden alone would have been targetable. As it was only him whose culpability had been established, the account of retributive targeted killing would not have allowed an air strike which could have killed other individuals. In case it had been impossible to strike at bin Laden without harming others the use of force could not have been justified morally on retributive grounds, no matter how grave his wrongdoing. The same rationale applies to the other cases this thesis presented. Without further commenting on the guilt of Nabhan and al-Awlaki, if the judgement had been that they deserved death on retributive grounds and capture without risk to soldiers had been considered to be impossible, exclusively killing them would have been justified. Given these very strict restraints on retributive targeted killing occasions in which such action is morally justifiable will be rare. As the cases demonstrate, most times culpable unjust individuals will either resist arrest or will be surrounded by people who do not deserve the death penalty in principle. Having said that, however, following from a Thomistic perspective, retributive targeted killing can meet, at least in principle, all of the three so-called deontological just war criteria of sovereign authority, just cause, and right intention.

## **6.4 Capital Punishment, War, and Contemporary Catholic Just War Thinking**

In the light of a very recent development in Catholic Social Teaching an interesting question arises with regard to the historical parallel between the death penalty and war: Does the Catholic just war require an update now that Pope Francis does no longer object to the death penalty on prudential and charitable grounds as his immediate predecessors used to do, but rules out this form of punishment as a matter of principle?

On 2 August, 2018, Francis (as cited in Ladaria 2018) asked for the following revision of the Catechism: “no matter how serious the crime that has been committed, the death penalty is inadmissible because it is an attack on the inviolability and the dignity of the person.” Inevitably, a decision of this magnitude has caused mixed reactions within a Church that has long been divided between reformers and traditionalists. On one side of the debate one finds supporters such as Ivereigh (2018) who defends Francis’s decision as in line with prior Church teaching. On the other, the pope’s critics have been outspoken against what they see as a position that contradicts two millennia of Church teaching. For example, in an appeal to the College of Cardinals (Arkes et al. 2018), forty-five scholars and clergy asked them to correct the pope regarding this “scandal.”

At first look, the answer to the question raised above might be that, given the close connection between the two forms of violence, a change in doctrine on the death penalty necessarily requires a change to the teaching of just war, too. Having said that, however, as Reichberg (2012, 1096) notes, no modern pope since at least Pius XII has advocated the conceptualisation of war as a means to inflict punishment on an unjust adversary. Likewise, taking a look at the Catechism’s treatment of just war (§2307-2317) the emphasis of the rationale of self-defence as just cause for war is immediately apparent. In addition, the first “condition for legitimate defense” reads as follows: “the damage inflicted by the aggressor on the nation or community of nations must be lasting, grave, and certain;” (§2309). There thus seems to be a focus on objective wrongdoing and, moreover, one is struck by the absence of any reference to the adversary’s subjective guilt.

As a result, rather than being in need of changing the Catechism as a consequence of the death penalty decision the Church seems to have already adopted a liability account to defensive harm for which important neo-Scholastics such as de Vitoria and de Molina paved the way by focusing on objective wrongdoing rather than

culpability. Interestingly and ironically perhaps, the official Catholic just war thus exhibits curious parallels with revisionist just war theorists such as McMahan. As a result, opposing the death penalty in principle seems irreconcilable with the punitive reading of Aquinas's just war this thesis has followed, but is in line with the other camp of the Thomistic just war which advocates a liability-based theory of just war. As far as the policy of targeted killing is concerned abandoning the analogy between the death penalty and war necessarily rules out the use of targeted killing as a means of retribution, no matter how much it would be circumscribed. Targeted killings would only be justifiable in cases the targets have made themselves liable to defensive harm.

## **Conclusion**

The employment of small-scale force as represented in the policy of targeted killing can flow from two possible just causes, defence and retribution. The first just cause is unlikely to cause much controversy given that defence is sacrosanct in international law as well as in contemporary just war thinking. However, the classical just war accepted just causes that went beyond defence, retributive punishment being one of them. As the casuistical analysis demonstrated, following one reading of St Thomas, the practice of targeted killing can accept retributive punishment as its second just cause. This argument is likely to attract criticism from those emphasising the merits of pure defence but, given the circumstances of today's asymmetric conflict, allowing the retributive targeted killing of non-state actors seems morally justifiable.

In addition, it is possible for both defensive and retributive types of targeted killing to meet the criterion of right intention. This chapter has pointed to some moral conundrums arising from the Obama administration's conduct and has suggested ways of addressing them. Moreover, the discussion concluded that it does not make sense to rule out particular means like, for example, drone strikes, as their virtuous

employment rules out any abuse in the first place. Additionally, with remote warfare it becomes increasingly difficult to distinguish between the command and rank-and-file level. As a direct consequence, leaders acting as exemplars of virtuous behaviour have great responsibility and must not tolerate misconduct. This way, subordinates have a chance to internalise the virtues and become virtuous themselves. Moreover, the necessity of a proper training in the virtues needs to be stressed. Both military leaders and lower-rank soldiers must receive the appropriate training.



## 7 Conclusion

This thesis has made a contribution to both methodological and substantive debates in contemporary just war thinking. In terms of methodology, it made an argument for the historical approach of Thomistic casuistry which not only parts with the methods of Walzer and his revisionist critics, but also deviates from Johnson's historical just war. In terms of its substantive contribution, this thesis made a two stage argument. Firstly, based on conventional textual assessment and logic, the chapter on sovereign authority identified who has the authority to conduct targeted killings and made an argument about how that authority should be exercised. It concluded that a partial recovery of the classical understanding of sovereign authority is the most ethical way of regulating small-scale uses of force. Secondly, based on the method of Thomistic casuistry, the chapter on liability assessed who is liable to that practice. "Renegotiating" the principles of just cause and right intention the chapter concluded that, besides the uncontroversial just cause of self-defence, the targeted killing of culpable unjust individuals can also be just on retributive grounds. However, the virtue-based right intention criterion sets up hurdles that are very difficult to jump over which makes the use of retributive targeted killing morally justifiable in exceptional circumstances only.

### 7.1 The Methodological Contribution

Contemporary just war thinking has mostly been split into two competing camps which disagree about both method and substance. The methodology chapter pointed out that, due to the two camps' different approaches and an ensuing lack of engagement with each other's work, Walzerians and revisionists have opposed each other in a "war of ethics within the ethics of war" (Vaha 2013, 183). Walzerians employ a casuistical method which seeks to reflect on historical cases. Taking the "legalist

paradigm” as their starting point for moral reflection they investigate when and how that paradigm should be disregarded in order to be morally just.

In contrast, most revisionists use Rawls’s method of reflective equilibrium. They take Walzer’s approach as the reigning theory and seek to contradict it and thereby build a better theory. In order to reveal the logical flaws in Walzer’s theory most revisionists prefer to rely on far-fetched thought experiments. Such analytical construction, they hope, helps isolate the moral principles which should guide ethical decision-making in war. Considering real-world uses of force, they believe, is a hindrance to identifying those principles. Furthermore, the chapter discussed how Walzerians and revisionists clash over their starting point of moral analysis. Walzerians are “collectivists” in that they mostly see the phenomenon of war as one that occurs between political communities. Revisionists, in contrast, consider themselves to be “reductive individualists,” who, as individualists, start their moral analysis from the individual as unit of analysis, not from the political community. At the same time, most revisionists are reductivists who, in contrast to Walzerians who distinguish between different moralities for war and peace and, most recently, one for *jus ad vim*, deny that there are different moralities. For them, the rules for killing in war are the same as those for killing in everyday life.

Taking the “confusingly polarized” (Clark 2017, 331) state of contemporary just war as jumping-off point the methodology chapter presented the historical approach to just war as a “third-way” in-between Walzerians and revisionists. It was argued that the use of a perspective which sides with neither camp all the time can help overcome what seems like a narrow intra-disciplinary divide. The historical approach, it was pointed out, like Walzerians, argues casuistically in the sense that it reflects on historical cases. However, unlike Walzerians, who have a limited interest in the thought of previous just war thinkers, the historical approach seeks to enter into debate with past scholars. Pointing to the difference between Walzerians and the

historical approach it goes without saying that the revisionist method, which ignores both historical cases and the thought of past thinkers, is even more alien to the historical approach.

Demonstrating the position of the historical approach as in-between Walzerians and revisionists the methodology chapter considered the substantive issue of moral symmetry from a historical perspective and vindicated the revisionist argument. Importantly, however, the chapter also noted that in order to arrive at this judgement it is not necessary to employ the revisionist method. Instead of resorting to far-fetched hypotheticals, a thorough engagement with the just war tradition can also provide this conclusion.

The chapter went on by arguing that the historical approach can have more than one interpretation. It was noted that Johnson's particular reading of Aquinas de-emphasises the transcendental aspect of the Angelic Doctor's just war and Thomistic casuistry, which gives due attention to Aquinas's virtue ethics, was introduced as a means to overcome this imperfection in Johnson's work. Thomistic casuistry, the chapter explained, employs casuistry as it was understood historically. In contrast to Walzer's and Johnson's lax type of casuistry, traditional casuistry follows a set of fixed steps which the chapter pointed out in detail. Moreover, one of the main advantages of traditional casuistry vis-à-vis Walzer's casuistry is that it not merely considers real-world circumstances but also fully engages with the work of previous thinkers in its use of moral principles.

Not forgetful about the downsides of the traditional casuistical method which contributed to its historical disrepute the chapter made an argument to, again, rely on St Thomas by bolstering the casuistical method with a virtue ethics element. This virtue approach, it was argued, can also be helpful in assessing the intellectual merit of thought experiments. Furthermore, the chapter sought to address critics of the

historical approach by pointing out how the general critique against the historical approach does not succeed against Thomistic casuistry.

## **7.2 The Substantive Contribution**

Making a two-stage argument, this thesis “renegotiated” the established *jus ad bellum* in light of the novel circumstances of a morally worrisome increase in the use of small-scale force post-9/11. Entering into a conversation with the philosophy of St Thomas its textual assessment as well as its casuistry reflected on the Obama administration’s conduct and provided an argument for how uses of small-scale force should be regulated.

With regard to sovereign authority, Aquinas’s first just war criterion, the chapter used a recent conversation between Coates and Steinhoff as point of departure. It was pointed out that the former thinker, who employs a historical approach, was subjected to a rigorous revisionist critique by the latter. Essentially, Steinhoff denies the viability of the authority criterion which Coates defends and argues that each and every individual can have the right to wage war. Tracing the roots of their disagreement back to their different starting points of analysis, namely, for Coates, the common good of the political community and, for Steinhoff, the individual, their particular face-off was then put on a broader basis by introducing Fabre’s cosmopolitan just war.

With that background in mind, the thinking of St Thomas with regard to questions of authority was spelled out next. Presenting Aquinas’s thinking as undergirding the pre-Westphalian understanding of sovereignty this position was contrasted with the Westphalian understanding which underpins Walzer’s just war and, as a result of revisionists’ concentration on Walzer’s work, has been the focus of revisionists, too.

Returning to the conversation between Coates and Steinhoff the chapter, then, provided an assessment of Steinhoff's critique. As it turned out, his critique partly succeeds against Coates, but fails against the just war of St Thomas. Adding a reflection on the broader revisionist argument against the authority criterion the chapter concluded that the main underlying aspect behind the clash over authority is the difference between collectivist and individualist approaches. Taking the political community as starting point, both the historical and Walzerian just war part with the reductive individualism of revisionists. In its final section, the chapter then turned to the issue of small-scale force. Engaging in a "renegotiation" of the legalist paradigm, a partial return to the pre-Westphalian understanding of authority was advocated, for both external and domestic conduct.

The chapter on liability to small-scale force "renegotiated" Aquinas's remaining just war criteria of just cause and right intention by employing Thomistic casuistry. Discussing both criteria in a single chapter was meant to be a testament to the inter-connectedness of St Thomas's just war criteria. As in the authority chapter, an effort was made to contrast the historical approach with both the Walzerian and revisionist schools of just war.

In the discussion of just cause it was pointed out that the prototypical just cause of the Thomistic just war is retribution as Aquinas took the rationale of self-defence for granted. It was argued that for St Thomas, based on his account of natural law, retributive just war had a domestic parallel, namely that of capital punishment. This emphasis of retribution, it was noted, deviates from a reading which presents self-defence as the only just cause for war as upheld by revisionists and, granted that they allow for exceptions in case the UN Security Council so decides, Walzerians, too. In particular, the chapter distinguished Aquinas's moral culpability account from McMahan's account of liability to defensive harm.

The following discussion of right intention concentrated on Aquinas's virtue ethics approach built around the cardinal and theological virtues. In line with the argument that the criterion of right intention "gives concrete shape to the condition of just cause" (Boyle 2003, 164), the complex interplay of these two sets of virtues was illustrated by the example of recent developments in Catholic Social Teaching.

The actual casuistical analysis of liability to small-scale force then, concluded that the practice of targeted killing can have the just causes of self-defence and retribution. However, both just causes must also meet the right intention criterion before such action is morally justified. Building on papal thinking up until 2 August, 2018, which held that the death penalty, although justified in principle, should not be carried out due to a demand of the highest theological virtue of charity it was argued that retributive targeted killing, too, is subject to the demand of divine love and thus only morally justifiable in very rare circumstances. This thesis's argument on targeted killing thus slightly deviates from St Thomas who, being a thinker of his time, was less restrictive with regard to the death penalty. At the same time, it also "renegotiates" the consensus within contemporary thinking that only self-defensive uses of force are morally justifiable.

### **7.3 Limitations and Potential for Future Research**

Having summarised this thesis's contribution to knowledge it goes without saying that there are also limitations to it. Besides the general potential shortcomings of the historical approach and the particular ones of casuistry which have been discussed in the methodology chapter this final section takes a look at some additional limitations and, when possible, argues that they can function as encouragement for further research.

To begin with, the most obvious limitation of this thesis with regard to parts of contemporary just war debate is its Thomistic approach. While, as this thesis argued, St Thomas's just war starts from the consensus position on just war of his day which integrated various non-religious influences he was, first and foremost, a Christian thinker. While this Christian pedigree is also present in his idea of sovereign authority and just cause his transcendental orientation can most directly be found in his account right intention. Arguing for an ethics of war which is built around a religious conviction will, unsurprisingly, cause uneasiness with secular thinkers. After all, as Brown (2018, 205) suggests, Walzer's secular approach might have been one of the reasons why he does not fully engage with the just war tradition as this tradition has historically been developed, to a significant extent, by Christian thinkers. Likewise, revisionists will object to a transcendental orientation to just war as such thinking evades their rigorous analytical scrutiny. Even Johnson, who is a theologian, seems to neglect the transcendental element in Aquinas's just war.

Having said that, while there seems to be no way to reconcile this fundamental difference between religiously-oriented and secular thinkers this thesis made an effort throughout to portray the just war tradition as broad enough to have a place for different streams; in O'Driscoll's (2008a, 109) words: "many just war theories, one just war tradition." Following from that, as this thesis's discussion of small-scale force sought to demonstrate, even when there are fundamental methodological disagreements between various approaches just war thinkers can and should take the other side's substantive work seriously. Taking it from there, one's own argument will most likely benefit as substantive disagreements can at least function as a reminder to think more deeply about the grave questions related to the ethics of war.

Besides this methodological issue, one substantive limitation of this thesis was deliberately brought about and noted in the introductory chapter, namely this thesis's focus on the practice of targeted killing. In contrast, for example, the broad account

of *jus as vim*, introduced by Walzer and developed by Brunstetter and his co-authors, goes beyond targeted killing. Besides small-scale uses of force against states such as in the imposition of no-fly zones the broad account is supposed to also deal with actions such as trade embargoes. This thesis, due to the decision to concentrate on targeted killing, has nothing to say about the actions just mentioned. Consequently, critics might point to this limitation. However, in response to this criticism, this ostensible shortcoming could be part of a future research agenda. There seems to be no reason why the Thomistic casuistry this thesis advocates cannot be employed to investigate those aspects, too. One example that immediately comes to mind is that of trade embargoes. While, of course, the historical circumstances were different, there seem to be interesting parallels between today's trade embargoes and earlier modes of siege warfare. In both actions, blocking the access to essential goods is used as a means to break the will of the opponent and bring about a change in behaviour. Interestingly, St Thomas argued about the morality of siege warfare (see, e.g., ST, II-II, q. 96, a. 6). As a result, it seems perfectly possible to assess the morality of trade embargoes from a Thomistic casuistical perspective. In order to do this, the other ingredients needed would be a paradigm case as basis for comparison as well as cases of contemporary trade embargoes. Moreover, demonstrating the potential of Thomistic casuistry beyond targeted killing there seems to be no reason why further issues such as no-fly zones or cyber warfare cannot be morally assessed in this way.

More generally, going beyond the debate about the morality of small-scale employments of force, Thomistic casuistry has the potential to illuminate further research projects within contemporary just war. While this thesis focused on one specific moral problem in contemporary world politics the approach it advocates is of a universal nature. For example, despite an increased interest in *jus post bellum*, the framework has not yet been looked at from a Thomistic perspective. While for the Thomistic just war *jus post bellum*, like *jus ad vim*, is part of *jus ad bellum* the latter framework might need a "renegotiation" with regard to post-war justice.



Without going into detail it seems that the Thomistic just war can make a valuable contribution in this regard through its emphasis of the right intention criterion as it connects right intention directly to the political goal of peace. Starting from there, the contemporary issue that immediately comes to mind is the refugee crisis the international community has been facing over the last few years. One argument made in public debate in Germany, the EU country that welcomed most refugees, has been that today's refugees should become a permanent component of the German workforce. That way, the German economy could address the difficulty to recruit enough workers which is the result of an ageing society. However, given the enormous loss of young people countries such as Syria have suffered, post-war reconstruction seems to be in danger if most of today's refugees were to stay in their host countries permanently. Put differently, the act of charity Germany's liberal asylum policy constitutes would, if the rationale mentioned above was driving its policy, be an act of narrow self-interest which threatens Syria's *post bellum* reconstruction.

Employing Thomistic casuistry to the moral problem of just refugee repatriation could not only make a valuable contribution to this question, but also bring together just war thinking and forced migration studies in an interdisciplinary project. It seems fair to argue that just war thinking has not given due attention to the moral issue of forced migration which oftentimes follows the outbreak of war. While some prominent just war thinkers (see, e.g., Elshtain 2009; Walzer 1984, 31-63) have argued about the morality of migration they have done so without employing the language of just war. A few exceptions notwithstanding (see, e.g., Banta 2008; Davidovic 2016; Kling 2016; Pattison 2015), the issue of forced migration has consequently not been in the centre of attention as far as questions of *jus post bellum* are concerned. The just war's silence on such an important issue amounts to a curious shortcoming as normative forced migration studies have long paid attention to questions one might list under *jus post bellum*. In particular, normative forced

migration scholars (see, e.g., Barnett 2001; Bradley 2008, 2013; Gibney 2014; Long 2013; Weiner 1998) have argued about the question of under what conditions refugees should return to their countries of origin and whether there is such a thing as a “just return.” There is thus potential for the Thomistic just war to bring together diverse approaches and thereby advance debate about one of the most pressing moral issues of our time.

## **7.4 Final Thoughts**

One of the objectives of this thesis was to trigger debate between the two competing camps of contemporary just war thinking. Questions of war and peace are far too serious to deliberately avoid an engagement with each other’s work solely because one does not like the other’s method. One negative consequence of such a refusal to take part in debate is that it can lead to a defence of positions which, upon close investigation, turn out to be morally indefensible as is the case in Walzer’s moral symmetry thesis. At the same time, presenting the Thomistic just war as a third-way in-between Walzerians and revisionists this thesis sought to remind contemporary thinkers of the very core of the just war as it has historically been understood, namely its practical function as a guide to statecraft. Therefore, most revisionists, too, lose something by concentrating on far-fetched hypotheticals which are of little use to decision-makers. The Thomistic casuistry this thesis advocates provides both historical awareness and analytical rigour and demonstrates that neither Walzerians nor revisionists have it right all the time. At the same time, this thesis willingly concedes that its own method is by no means flawless either. Rather, in line with the venerable virtue of *humilitas*, this thesis should be read as a call to just war thinkers, no matter their particular background, to appreciate that the just war tradition is far greater than one’s own narrow approach and only functions well if the various schools are willing to debate with each other.

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